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Codification In Company Law of General CSR Requirements: Pioneering Recent French Reforms and EU Perspectives

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Alain Pietrancosta
Sorbonne Law School and ECGI

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Abstract

This paper deals mainly with recent French and European developments regarding integration of corporate social responsibility (CSR) requirements into company law. The new provisions of French company law appear currently to be unique internationally. Indeed, for a number of years, France has purposefully positioned itself as a leading country in codifying CSR obligations, with the prospect that others might learn and take inspiration from the French experience. France has adopted two company-law reforms to decrease adverse external impacts of activities of covered French companies. The first, introduced in 2017, imposes an extensive so-called "duty of vigilance" on large French corporations: a legally binding obligation to implement a proactive plan to prevent serious adverse impact resulting from company, subsidiary, supplier and subcontractor activities throughout the world, to 1) human rights and fundamental freedoms, 2) human health and safety, and 3) the environment. The second, introduced in 2019 (the "PACTE law"), applicable to all companies registered in France, regardless of their form or size, imposes a broadly defined duty to take into consideration the social and environmental impacts of their activities. The PACTE law also contained two optional provisions, introducing into French law two new concepts: the "raison d'être" – company's fundamental reason for being – that a company may define in its bylaws, to state its principles or core values; and the "société à mission" ("mission-driven company"), a new category of entity, conceptually similar to a "B-corp". These reforms are important regulatory developments. As lawyers, we have come to know that CSR norms of conduct no longer lie outside the law, but here they have made a significant breakthrough in our company law. The legal means to address CSR issues in France have evolved significantly, from disclosure (initially voluntary, then mandatory) to substantive and prescriptive legal requirements (initially narrower and more specific, then broader and more general). As company lawyers, we can only be struck by the use and exploitation of company law for CSR purposes, the consequent politicisation of the role of companies, and the consequent "mix of genres" or confusion introduced between public interest and private interest goals. In terms of public policy, debate continues on the efficacy of these generalised precautionary measures intermediated by company leaders elected by shareholders, compared to direct regulatory measures targeting specific social or environmental issues. Despite its shortcomings, and the initial scepticism, the French model is experiencing an important milestone, as it has largely inspired the European Commission in its directive proposal on Corporate Sustainability Due Diligence ("CSDD"). After years of discussion, this proposal, a 77 page-long document, has been published on 23 February 2022. Utilizing a similar dual structure to that of the French law, the proposed EU directive on CSDD contains for large companies both specific due diligence obligations and a general duty of care, requiring company directors and executives to take into account sustainability matters in fulfilling their obligations to act in the best interest of the company. A comparison of the French and EU texts shows that while the general inspiration and orientation are common, there are significant differences between the two models, in terms of scope, content of the obligations and enforcement. The European proposal appears more comprehensive, elaborate, detailed and threatening to the corporate status quo. It contains a series of technical references that should be clarified or corrected during the negotiation process towards the final text. It also reveals a number of policy choices different than those in the French law. These include 1) its application to a larger array of companies, including non-EU companies operating in Europe, 2) its provisions on climate change and 3) its imposition of a general directors' duty of care on various social and environmental matters, that are likely to raise strong national opposition.

Keywords: Company law, CSR, Corporate sustainability, Corporate purpose, Company interest, Due diligence, Duty of vigilance, Duty of care, Stakeholders, Environment, Climate, Raison d'être, Société à mission

JEL Classifications: K22, K32, K42

Alain Pietrancosta
Professor of Law
University of Paris
17, rue de la Sorbonne
Paris, IL 75005, France
e-mail: pietrancosta.alain@noos.fr

CODIFICATION IN COMPANY LAW OF GENERAL CSR REQUIREMENTS: PIONEERING RECENT FRENCH REFORMS AND EU PERSPECTIVES

Alain Pietrancosta*

Abstract

This paper deals mainly with recent French and European developments regarding integration of corporate social responsibility (CSR) requirements into company law. The new provisions of French company law appear currently to be unique internationally. Indeed, for a number of years, France has purposefully positioned itself as a leading country in codifying CSR obligations, with the prospect that others might learn and take inspiration from the French experience.

France has adopted two company-law reforms to decrease adverse external impacts of activities of covered French companies. The first, introduced in 2017, imposes an extensive so-called "duty of vigilance" on large French corporations: a legally binding obligation to implement a proactive plan to prevent serious adverse impact resulting from company, subsidiary, supplier and subcontractor activities throughout the world, to 1) human rights and fundamental freedoms, 2) human health and safety, and 3) the environment. The second, introduced in 2019 (the "PACTE law"), applicable to all companies registered in France, regardless of their form or size, imposes a broadly defined duty to take into consideration the social and environmental impacts of their activities. The PACTE law also contained two optional provisions, introducing into French law two new concepts: the "*raison d'être*" – company's fundamental reason for being – that a company may define in its bylaws, to state its principles or core values; and the "*société à mission*" ("mission-driven company"), a new category of entity, conceptually similar to a "benefit corporation" or public benefit corporation" in the US.

These reforms are important regulatory developments. As lawyers, we have come to know that CSR norms of conduct no longer lie outside the law, but here they have made a significant breakthrough in our company law. The legal means to address CSR issues in France have evolved significantly, from disclosure (initially voluntary, then mandatory) to substantive and prescriptive legal requirements (initially narrower and more specific, then broader and more general).

As company lawyers, we can only be struck by the use and exploitation of company law for CSR purposes, the consequent politicisation of the role of companies, and the consequent "mix of genres" or confusion introduced between public interest and private interest goals. In terms of public policy, debate continues on the efficacy of these generalised precautionary measures

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intermediated by company leaders elected by shareholders, compared to direct regulatory measures targeting specific social or environmental issues.

Despite its shortcomings, and the initial scepticism, the French model is experiencing an important milestone, as it has largely inspired the European Commission in its directive proposal on Corporate Sustainability Due Diligence ("CS3D"). After years of discussion, this proposal, a 77 page-long document, has been published on 23 February 2022. Utilizing a similar dual structure to that of the French law, the proposed CS3D contains for large companies both specific due diligence obligations and a general duty of care, requiring company directors and executives to take into account sustainability matters in fulfilling their obligations to act in the best interest of the company.

A comparison of the French and EU texts shows that while the general inspiration and orientation are common, there are significant differences between the two models, in terms of scope, content of the obligations and enforcement. The European proposal appears more comprehensive, elaborate, detailed and threatening to the corporate status quo. It contains a series of technical references that should be clarified or corrected during the negotiation process towards the final text. It also reveals a number of policy choices different than those in the French law. These include 1) its application to a larger array of companies, including non-EU companies operating in Europe, 2) its provisions on climate change and 3) its imposition of a general directors' duty of care on various social and environmental matters, that are likely to raise strong national opposition.

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INTRODUCTION

1. This paper focuses on the ongoing integration of CSR requirements into French company law. For a number of years, France has concentrated intensely on this topic of increasing interest to the rest of the world and has become for many an important CSR jurisprudential model.[1] Our CSR regimes continue to evolve, as this paper reveals, inspiring ongoing national and international legislative work, leading in the near term in particular to a proposal for European directive, currently being drawn up, as part of the European Commission action plan on financing sustainable growth (March 2018), on corporate sustainability due diligence,[2] which could in turn, as a result of its worldwide application, become an international regulatory model.[3]

2. The French experience, with what appears currently to be unique CSR provisions of French company law, is accordingly interesting and in a number of respects quite revolutionary. Indeed, for a number of years now, France has increasingly viewed itself as a global leader in CSR jurisprudence,[4] a forerunner hopefully providing an inspiring model for others to observe and perhaps follow.[5] This national ambition has manifested itself through two French company law reforms, intended to prevent companies' negative externalities, or simply put, harm to society. The first legislation, introduced in 2017, imposes an extensive so-called "duty of vigilance" on large French corporations: a legally binding obligation to implement a proactive plan to prevent serious injury to human rights and fundamental freedoms, to the health and safety of people and to the environment, which might result from company, subsidiary, supplier and subcontractor activities throughout the world. A second piece of legislation, introduced in 2019, known as "PACTE law",[6] applicable to all companies registered in France, regardless of their forms or sizes, imposed a broadly defined duty to take into consideration the social and environmental impacts of their activities, and also contains two optional provisions, introducing into French law two new concepts: the "*raison d'être*" – company's fundamental reason for being – that a company may define in its bylaws; and the "*société à mission*" ("mission-driven company"), a new label, called on the B-corp model.

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* Professor, Sorbonne Law School (University of Paris 1).

[1] See Access to Legal Remedies for Victims of Coporate Human Rights Abuses in Third Countries, European Parliament, Feb. 2019, p. 109.

[2] Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, Brussels, 23 Feb. 2022, COM(2022) 71 final, 2022/0051 (COD).

On calls for mandatory due diligence legislation at the EU level, see Responsible Business Conduct Working Group, Shadow EU Action Plan on the Implementation of the UN Guiding Principles on Business and Human Rights within the EU, March 2019, available at: https://responsiblebusinessconduct.eu/wp/wp-content/uploads/2019/03/SHADOW-EU-Action-Plan-on-Business-and-Human-Rights.pdf at 6; European Coalition for Corporate Justice ("ECCJ"), "Civil Society Calls for Human Rights and Environmental Due Diligence Legislation", 3 October 2019, available at: http://corporatejustice.org/news/16785-civil-society-calls-for-human-rights-and-environmental-due-diligence-legislation; ENNHRI, Recommendations of the new EU Commission: developing and adopting an EU-level Action plan on Business and Human Rights, November 2019, available at: http://ennhri.org/wp-content/uploads/2019/11/ENNHRI-BHR-Statement_EU-Commision.pdf: "[T]o enhance legal certainty for both rights holders and businesses and to ensure a level playing field within the EU, the Action Plan should aim at avoiding the creation of an eclectic system of human rights due diligence norms that differ from member state to member state and should instead assess options for an EU-level regulation in this area."

[3] Some may view it as a new illustration of the "Brussels effect", see A. Bradford, The Brussels effect, Oxford University Press, 2020.

[4] "the white knight of CSR", see I.M. Barsan, Corporate Accountability: Non-Financial Disclosure and Liability – A French Perspective (November 30, 2017). ECFR 2017, 399-434, Available at SSRN: https://ssrn.com/abstract=3325733.

[5] See Access to Legal Remedies for Victims of Coporate Human Rights Abuses in Third Countries, European Parliament, Feb. 2019, p. 109.

[6] PACTE stands for: "*Plan d'action pour la croissance et la transformation des entreprises*".

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Thus, France has sought to distinguish itself as the first country in the world to experiment with such broad and general mandatory legal requirements. Needless to say, these two pieces of legislation have generated extraordinary international interest and already have become a reference point in ongoing French national, European and international legislative debates. Before briefly describing their respective contents, I would like to offer three general observations to provide some perspective and context for this evolution.

3. Firstly, these reforms reflect an important development from a regulatory viewpoint. As lawyers, we fully appreciate that CSR today no longer begins where the law ends,[7] which should result in an expansion of CSR provided that effective enforcement mechanisms follow.[8] In recent years, CSR norms, leaving the sphere of programmatic declarations, recommendatory principles and experimental ethics, have made a remarkable breakthrough in legislation, particularly that applicable to companies.[9] The legal means developed to define and address CSR issues have evolved significantly over this time period.

4. Initially, to address CSR issues, legislators tended to favour disclosure. At first, voluntary, CSR disclosure regimes became mandatory for large companies.[10] France appears to be the first European country to introduce non-financial disclosure requirements for certain listed companies, with the Law of 15 May 2001 on new economic regulations (NRE).[11] On the climate front, the Law of 12 July 2010 on the national commitment to the environment requires large private and public entities to disclose at least every three years the amount of their greenhouse gas emissions, and describe the actions planned to reduce them.[12] The law of 17 August 2015 "*for the energy transition and green growth*" further obliged every company listed on a regulated market to include in its annual management report "*indications on the financial risks related to the effects of climate change and the presentation of the measures taken by the company to reduce them by implementing a low-carbon strategy in all the components of its activity*."[13] In the EU, the hardening or "legalisation" (incorporation into legally binding legislative or regulatory regimes) of CSR is mainly[14] reflected in the European Directive of 22 October 2014 requiring disclosure

[7] See C.D. Stone, Where the Law Ends, Harper Torchbooks, 1975. In 2001, the European Commission asserted in its green paper "Promoting a European framework for Corporate Social Responsibility", that "most definitions of corporate social responsibility describe it 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. Being socially responsible means not only fulfilling legal expectations, but also going beyond compliance and investing "more" into human capital, the environment and the relations with stakeholders." In its 2011 Communication "A renewed EU strategy 2011-14 for Corporate Social Responsibility", the EC referred to its previous definition (Promoting a European framework for Corporate Social Responsibility, Green paper, 18 July 2001, COM(2001) 366 final, § 20 and 21) and stated that "Corporate social responsibility concerns actions by companies over and above their legal obligations towards society and the environment." (COM (2011) 0681).

[8] See C. Bright, C. Macchi, *Hardening Soft Law: The Implementation of Human Rights Due Diligence Requirements in Domestic Legislation, in* M. Buscemi, N. Lazzerini and L. Magi (eds), *Legal Sources in Business and Human Rights - Evolving Dynamics in International and European Law*, 2020, Brill.

[9] See C. Bright, A. Marx, Nina Pineau, and Jan Wouters, Toward a Corporate Duty for Lead Companies to Respect Human Rights in Their Global Value Chains?, Business and Politics 2020; 22(4): 667.

[10] G. Berger-Walliser and Inara Scott, Redefining Corporate Social Responsibility in an Era of Globalization and Regulatory Hardening, American Business Law Journal, Volume 55, Issue 1, 167–218, Spring 2018.

[11] See e.g., C. Malecki, Responsabilité sociale des entreprises – Perspectives de la gouvernance d'entreprise durable, LGDJ 2014, n° 127.

[12] Art. L. 229-25 Code de l'environnement, which, for private entities, applies to those with more than 500 employees. The decree n° 2022-982 of July 1, 2022 extended the disclosure obligation to scope 3 emissions.

[13] Code of Commerce, Art. L. 22-10-35.

[14] See the first references to the inclusion of "*non-financial key performance indicators relevant to the particular business, including information relating to environmental and employee matters*", "*to the extent necessary for an understanding of the company's development, performance or position*", in the directive 2003/51/EC of 18 June 2003 on the annual and consolidated accounts of certain types of companies, banks and other financial institutions and insurance undertakings.

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of non-financial and diversity information by large EU public-interest entities[15] ("Non-Financial Reporting Directive" or NFRD), supplemented by non-binding guidelines (2017), including the most recent ones (June 2019) on corporate climate-related information reporting.[16] As announced in the "Green Deal for Europe," the NFRD is currently under review, as part of the strategy to strengthen the foundation for sustainable investment. The EC published a proposal on April 21, 2021.[17] The directive would change its name from NFRD to CSRD ("Corporate sustainability reporting directive"). The scope of companies covered will likely be extended and include all large EU companies and listed companies (except listed micro-companies), increasing the number of covered companies from 11.600 to 49.000 (i.e., from 47% of the turnover of all limited liability companies to 75%). The final draft of the proposal also covers non-EU undertakings that have a significant activity on the EU territory, i.e. a net turnover of more than EUR 150 million, and a large or listed subsidiary, or a significant branch in the EU, i.e. generated a net turnover of more than EUR 40 million. In addition to extending its personal scope, the CSRD modifies the objective scope and content of reporting obligations by proposing more precise and numerous requirements (content, information format, third-party assurance, etc.), in part in response to investors' increasing expectations and regulatory developments. The "double materiality" of information is reflected in the requirement to include in the management report both how sustainability issues affect the company's performance (the outside-in perspective) and how the company itself impacts people and the environment (the inside-out perspective). Such information must contain in particular "*a brief description of the undertaking's business model and strategy, including: (i) the resilience of the undertaking's business model and strategy to risks related to sustainability matters; (ii) the opportunities for the undertaking related to sustainability matters; (iii) the plans of the undertaking, including implementing actions and related financial and investment plans, to ensure that its business model and strategy are compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5 °C in line with the Paris Agreement and the objective of achieving climate neutrality by 2050 as established in Regulation (EU) 2021/1119 (European Climate Law), and where relevant, the exposure of the undertaking to coal, oil and gas-related activities; (iv) how the undertaking's business model and strategy take account of the interests of the undertaking's stakeholders and of the impacts of the undertaking on sustainability matters; (v) how the undertaking's strategy has been implemented with regard to sustainability matters; (b) a description of the time-bound targets related to sustainability matters set by the undertaking, including where appropriate absolute greenhouse gas emission reduction targets at least for 2030 and 2050, a description of the progress the undertaking has made towards achieving those targets, and a specification of whether the undertaking's targets related to environmental matters are based on conclusive scientific evidence; (c) a description of the role of the administrative, management and supervisory bodies with regard to sustainability matters, and of their expertise and skills to fulfil this role or access to such expertise and skills; (d) a description of the undertaking's policies in relation to sustainability matters; (da) information about the existence of incentive schemes offered to members of the administrative, management and supervisory bodies which are linked to sustainability matters; (e) a description of: (i) the due diligence process implemented by the*

[15] The NFRD applies to large "public-interest entities" (i.e. EU companies listed on an EU regulated market; listed or non-listed credit institutions, insurance undertakings or any undertaking designated as such by Member States) with an average number of employees in excess of 500, and to public-interest entities that are parent companies of a large group with an average number of employees in excess of 500 on a consolidated basis.

[16] EU Guidelines on non-financial reporting: Supplement on reporting climate-related information, C/2019/4490 of June 2019. See also European Commission, "Sustainable finance: Commission publishes guidelines to improve how firms report climate-related information and welcomes three important new reports on climate finance by leading experts" (18 June 2019), available at: http://europa.eu/rapid/press-release_IP-19-3034_en.htm.

[17] Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards corporate sustainability reporting (COM/2021/189 final), Brussels, 21.4.2021 COM(2021) 189 final, 2021/0104 (COD).

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undertaking with regard to sustainability matters, and where applicable in line with EU requirements on undertakings to conduct a due diligence process; (ii) the principal actual or potential adverse impacts connected with the undertaking's own operations and with its value chain, including its products and services, its business relationships and its supply chain, actions taken to identify and track these impacts, and other adverse impacts which the undertaking is required to identify according to other EU requirements on undertakings to conduct the due diligence process; (iii) any actions taken by the undertaking, *and the result of such actions, to prevent, mitigate, remediate or bring an end to actual or potential adverse impacts; (f) a description of the principal risks to the undertaking related to sustainability matters, including the undertaking's principal dependencies on such matters, and how the undertaking manages those risks; (g) indicators relevant to the disclosures referred to in points (a) to (f)*".[18] The directive also provides for the elaboration of European standards for non-financial reporting and entrusts the European Financial Reporting Advisory Group (EFRAG) with their development. The framework proposals were published in March 2021.

In the EU, one can also mention the recent Taxonomy Regulation, of June 18, 2020,[19] establishing the world's first-ever "green list". First building block of the "Financing Sustainable Growth" action plan launched by the European Commission in March 2018, the new regulation, which became effective in January 2022, provides for a classification system ("taxonomy") for sustainable economic activities, that requires NFRD companies to disclose the extent to which their sales, investments and/or expenditures are linked to activities defined in the EU taxonomy.[20] Likewise, financial-market participants (such as asset managers) must now disclose the extent to which activities of their financial products fund meet the EU Taxonomy criteria. The regulation thus makes it possible to share a common definition of sustainability and to reduce the risks of "greenwashing". The classification criteria were specified on June 4, 2021, in a 349-page delegated regulation![21]

European ESG disclosure requirements were also extended by the second component of the "Financing Sustainable Growth" action plan, the so-called SFDR of November 27, 2019, standing for "Sustainable Finance Disclosure Regulation".[22] Effective in March 2021, the SFDR requires EU investment funds and asset managers to disclose on their websites how they factor "sustainability risks" into their investment decision-making process and, according to the "double materiality principle" mentioned above, how they consider principal adverse impacts of investment decisions on sustainability factors.[23] Large financial market participants (more than 500 employees) are even required to publish and maintain on their websites a statement on their

[18] CSRD, Art. 1(1).

[19] Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088, OJEU, 22 June 2020, L 198/13.

[20] See Commission delegated regulation (EU) 2021/2178 of 6 July 2021 supplementing Regulation (EU) 2020/852 of the European Parliament and of the Council by specifying the content and presentation of information to be disclosed by undertakings subject to Articles 19a or 29a of Directive 2013/34/EU concerning environmentally sustainable economic activities, and specifying the methodology to comply with that disclosure obligation, OJEU, 10 Dec. 2021, L 443/9.

[21] Commission delegated regulation (EU) 2021/2139 of 4 June 2021 supplementing Regulation (EU) 2020/852 of the European Parliament and of the Council by establishing the technical screening criteria for determining the conditions under which an economic activity qualifies as contributing substantially to climate change mitigation or climate change adaptation and for determining whether that economic activity causes no significant harm to any of the other environmental objectives, OJEU, 9 Dec. 2021, L 442/1.

[22] Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector, OJEU, 9 Dec. 2019, L 317/1.

[23] Formerly, the shareholder rights directive (2007/36), amended by the directive 2017/828 of 17 May 2017 encouraging long-term shareholder engagement, whose Article 3g 1 required institutional investors and asset managers, but only on a comply or explain basis, to describe in their public engagement policies "*how they monitor investee companies on relevant matters, including strategy, financial and non-financial performance and risk, capital structure, social and environmental impact and corporate governance, conduct dialogues with investee companies, exercise voting rights and other rights attached to shares, cooperate with other shareholders, communicate with relevant stakeholders of the investee companies and manage actual and potential conflicts of interests in relation to their engagement*".

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due diligence policies with respect to the principal adverse impacts of investment decisions on sustainability factors. In this area also, France set a worldwide precedent with the 17 August 2015 law on the energy transition for green growth (LTECV) and its corresponding decree of 29 December 2015, requiring asset management companies to be transparent about the inclusion of environmental, social and governance (ESG) objectives in their investment strategies.[24]

5. Certain CSR promoters have questioned these reporting requirements,[25] on the basis of alleged shortcomings, particularly that they are not very effective,[26] do not in many cases provide for sanctions for non-compliance and do not require substantive due diligence.[27] They also come *post facto*[28]. Too harsh a criticism runs the risk, however, of ignoring the prevention, emulation and sanctioning virtues, at least reputational, of their disclosure requirements. Transparency does not merely reveal what exists: it often leads to changes in what exists. As Justice Brandeis famously noted, "sunlight is often the best disinfectant!" This change through disclosure requirements can be achieved by means of negative incentives (sticks, not carrots), at least through fears of market reactions, but also by means of actual constraints, as reflected in the latest developments in transparency on sustainability issues: obligations on companies to disclose publicly their sustainability strategies and due diligence policies, therefore in effect requiring them to have some. In this context and perspective, transparency and substantive obligations are not so much alternatives to each other as complementary policies.

It is nonetheless clear that, reflecting experience with limitations on using reporting requirements, the second generation of CSR provisions is more substantive, utilising *a priori* or *ex ante* obligations designed to identify risks and prevent harm, to specifically protected human and/or environmental interests.[29] What was gained in terms of depth and sanctions, however, was lost in terms of scope: these later CSR legal provisions only targeted specific fields or issues, evidently selected on the basis of their perceived importance and social sensitivity. Examples include: human trafficking and slavery (2010 California Transparency in Supply Chains Act on human trafficking and slavery; 2015 UK Modern Slavery Act; 2018 Australian Modern Slavery Act); child Labour (Dutch Child Labour Due Diligence Law of 24 October 2019, expected to enter into force mid-2022); dangerous substances used or stored in large quantities (Seveso III Directive (EU Directive 2012/18/EU)); import of certain minerals (EU Regulation n° 2017/821 of 17 May 2017 on so-called "conflict minerals"[30]) or certain materials (European proposals for

[24] Article 173-VI of the LTECV; Art. L.533-22-1 of the Monetary and Financial Code.

[25] Other general criticisms of similar requirements have been raised, related to their costs, the allegedly insufficiently demonstrated usefulness of certain non-financial disclosure requirements for investor protection in general and the risk they could be exploited by advocacy groups to influence the behaviour of corporations in which they have little economic stake. See the letter sent by a group of professors of law and finance to the SEC in response to its recent proposal on Climate-Related Disclosures for Investors, File No. S7-10-22, April 25, 2022.

[26] Study on due diligence requirements through the supply chain, EC, January 2020, p. 247.

[27] Study on due diligence requirements through the supply chain, EC, January 2020, p. 154; C. Macchi and C. Bright, 'Hardening Soft Law: The Implementation of Human Rights Due Diligence Requirements in Domestic Legislation', in M. Buscemi, N. Lazzerini, L. Magi and D. Russo (eds), Legal Sources in Business and Human Rights – Evolving Dynamics in International and European Law (Leiden, Boston: Brill, 2020), p 218.

[28] D. Weber-Rey, Lost in detail: setting priorities for corporations in challenging times, In Reforming business for the 21st century, British Academy Review Autumn 2018, p. 15.

[29] On the interdependence of environmental protection measures and human rights, including those of future generations, see the very enlightening decision of the German Constitutional Court: BVerfG, Order of the First Senate of 24 March 2021 - 1 BvR 2656/18.

[30] Regulation n° 2017/821 of 17 May 2017 laying down obligations related to the due diligence with regard to the supply chain for importers of the Union who import tin, tantalum and tungsten, ores and gold from conflict or high-risk areas, JO L 130, 19/5/2017, p. 1-20. See Study on due diligence requirements through the supply chain, EC, January 2020, p. 167.

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a Regulation on deforestation-free supply chains[31] or for a new Batteries Regulation.[32]). In Switzerland, an act was passed in 2020 imposing due diligence obligations regarding both conflict minerals and child labour; effective on January 1, 2022. In France, an act of December 9, 2016 (Art. 17), the so-called "Sapin II Act"[33], requires large companies with at least 500 employees and a turnover of at least 100 million € (about 1570 companies) to adopt anti-corruption plans, or otherwise face a fine of 1 million €, enforced by a newly established anti-corruption agency (AFA).

6. Taking a further step in the legal escalation, a third generation of CSR provisions broadens many such substantive obligations, which become more horizontal, cross-sectoral and cross-issue. France, already an innovator in mandatory environmental disclosure regulation,[34] once again appears to lead the way, with this broader, more holistic approach. This new holistic approach has operated both objectively, with an extensive duty of vigilance i.e., a substantive monitoring obligation, imposed on large stock corporations in 2017, and subjectively, with a duty imposed on all companies, regardless of their legal forms or sizes, in 2019 to take into consideration social and environmental issues.

France has not only legally adopted the 2011 United Nations guiding principles on human rights (UNGPs), expressly including the health and safety of persons,[35] but has extended the diligence requirements to the protection of the environment, following: the 2011 OECD Guidelines for Multinational Enterprises, the G7 Leaders' Declaration adopted on 7-8 June 2015 in Schloss Elmau, which recognised the importance of establishing a common understanding on due diligence and encouraged enterprises active or headquartered in their countries to implement due diligence in their supply chains, the G20 Leaders' Declaration adopted on 8 July 2017 in Hamburg, committed to fostering the implementation of labour, social and environmental standards and human rights in line with internationally recognised frameworks in order to achieve sustainable and inclusive supply chains, and underlined the responsibility of businesses to exercise due diligence in this regard; and the subsequent 2018 OECD Due Diligence Guidance for Responsible Business Conduct, supplementing the 2011 OECD Guidelines, and the 2018 UN Office of the High Commissioner for Human Rights (OHCHR) Framework principles on human rights and the environment, insisting on the close intertwining of human rights and environmental protection.[36]

Such mandatory CSR laws reflect a tendency in France to use regulation as a policy instrument to react to crisis and to guide people's or companies' conduct more directly, rather than a

[31] Proposal for a Regulation of the European Parliament and of the Council on the making available on the Union market as well as export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010 (COM(2021) 706 final).

[32] Proposal for a Regulation of the European Parliament and of the Council concerning batteries and waste batteries, repealing Directive 2006/66/EC and amending Regulation (EU) No 2019/1020 (COM/2020/798 final).

[33] See La loi « Sapin II » prise aux mots. Transparence - anticorruption – modernisation, sous la direction d'A. Pietrancosta, éd. Fauves, 2017 ; France – US – UK. An overview of the anticorruption law, Orrick Herrington & Sutcliffe, éd. Fauves, 2017; X. Boucobza, Y.-M. Serinet, Loi « Sapin 2 » et devoir de vigilance : l'entreprise face aux nouveaux défis de la compliance, Recueil Dalloz 2017 p. 1619.

[34] France was the first European country to introduce non-financial reporting for certain large companies, with the Law of 15 May 2001 on new economic regulations (NRE) (Art. 116), see H. Segain, L. Vincent, Gouvernance des sociétés cotées : guide pratique sur l'intégration des enjeux de responsabilité sociétale et environnementale (RSE), Herbert Smith Freehills, 4 mars 2022, p. 21.

[35] See J. Ruggie, Business and Human Rights: Towards Operationalizing the 'Protect, Respect and Remedy' Framework, Report to the UN Human Rights Council (Business and Human Rights Report), UN Doc. A/HRC/11/13, 22 April 2009, § 71; J. Bonnitcha, R. MC Corquodale, The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights, vol. 28, 2017, European Journal of International Law, n° 3, p. 899.

[36] "Human beings are part of nature, and our human rights are intertwined with the environment in which we live. Environmental harm interferes with the enjoyment of human rights, and the exercise of human rights helps to protect the environment and to promote sustainable development."

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particularly strong adherence to stakeholder theory. The French are also reputed to have some scepticism about markets, as now illustrated by a good number of opinion polls.[37] In 2010, 60% of them judged negatively the term "profit" (while 91% consider that the objective of a business is to make a profit...) and a little more of 70% had a bad image of "capitalism", against 62% in December 2021.[38]

7. Even if this idiosyncrasy explains the legal origin of the movement, it is unable to explain fully its dynamics and expansion. The political will behind the adoption of these new obligations, especially of the law on the duty of vigilance, has from the outset incorporated the idea that their effectiveness and efficiency would depend on their international appeal.[39] Thus, partly under the influence of the French government, encouraged by French companies willing to share the burden of such general obligations of vigilance with their worldwide competitors, the French approach has been used as a model by the European Commission, which has proposed to extend it to the entire European Union through a directive, under discussion for more two years[40].

This process started in January 2020, with a study on options for regulating due diligence requirements through the supply chain, which concluded that voluntary regimes across Europe had failed to change the way businesses managed their corporate governance responsibilities. As a consequence, in April 2020 Didier Reynders, the European Commissioner for Justice, announced that the European Commission would introduce new company legislation on mandatory human rights and environmental due diligence. Reasons for support for a mandatory due diligence duty at the EU level "include higher levels of implementation, access to remedies but also the levelling of the playing field, a single harmonized standard, and legal certainty".[41] Taking into account the results of a public comment period which ended in February 2021 and non-binding recommendations from the European Parliament in March 2021,[42] the European Commission issued this new legislative proposal on the 23rd of February 2022,[43] described as "real game changer in the way companies operate their business activities throughout their global supply chain"[44] or "a watershed moment for human rights and the environment".[45] Based and building on the French model,[46] the future corporate sustainability due diligence directive would "*set out a horizontal framework to foster the contribution of businesses operating in the single*

[37] See Les Français champions du monde de l'anti-capitalisme (The French are world champions in anti-capitalism), https://www.latribune.fr/actualites/economie/20110125trib000595445/les-francais-champions-du-monde-de-l-anti-capitalisme.html.

[38] Baromètre de l'économie (décembre 2021), by Odoxa for Abeille Assurances, *Challenges* and BFM Business.

[39] See T. Sachs (2017). « La loi sur le devoir de vigilance des sociétés-mères et sociétés donneuses d'ordre : les ingrédients d'une corégulation », Revue de droit du travail, n° 6, p. 380-390 ; P. Pailot, D. de Saint-Affrique (2020), Loi sur le devoir de vigilance : éléments d'analyse d'une forme de juridicisation de la RSE, Management international-Mi-, 24(2), 109.

[40] Study on due diligence requirements through the supply chain, EC, January 2020.

[41] Study on due diligence requirements through the supply chain, EC, January 2020, p. 154.

[42] European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)), P9_TA(2021)0073; see ECLE, The European Parliament's draft directive on corporate due diligence and corporate accountability, Rivista Delle Società, Anno LXVI Fasc. 2-3 – 2021 and RTDF 2022/1.

[43] Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, Brussels, 23 Feb. 2022, COM(2022) 71 final, 2022/0051 (COD). In a Communication on Decent Work Worldwide, the EU Commission confirmed that it is preparing an additional legislative initiative to prohibit goods made with forced labour, including forced child labour, from the EU market, see Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on decent work worldwide for a global just transition and a sustainable recovery, Brussels, 23.2.2022, COM(2022) 66 final.

[44] Didier Reynders, Commissioner for Justice.

[45] R. Gardiner of Global Witness, in Aoife White, A. Nardelli and S. Bodoni, Unethical Firms Risk Massive Bills in EU Supply-Chain Crackdown, Bloomberg, 21 February 2022.

[46] See T. Beau de Loménie, S. Cossart and P. Morrow, 'From Human Rights Due Diligence to Duty of Vigilance, Taking the French Example to the EU Level' in Angelica Bonifanti (ed), Business and Human Rights in Europe (New York: Routledge 2019) p 133; ECLE, The European Parliament's draft directive on corporate due diligence and corporate accountability, Rivista Delle Società, Anno LXVI Fasc. 2-3 – 2021 and RTDF 2022/1; The Emergence of a European Duty of Vigilance for Large Companies and Its Potential Impact at the National Level, Latham & Watkins, Client Alert, 1 March 2022 | Number 2937.

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market to the respect of the human rights and environment in their own operations and through their value chains, by identifying, preventing, mitigating and accounting for their adverse human rights, and environmental impacts, and having adequate governance, management systems and measures in place to this end."[47] More innovative, but echoing, complementing and hardening the forthcoming CSRD – hence, the similarities in their concepts and language –, is the obligation for the largest EU and non-EU companies covered to "*adopt a plan to ensure that the business model and strategy of the company are compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5°C in line with the Paris Agreement*"; a plan that must include "*emission reduction objectives*" "*when climate change is or should have been identified as a principal risk for, or a principal impact of, the company's operations*."[48]

Formally, the Directive is part of company law. Its legal basis lies in Article 50(1) and (2)(g) TFEU providing for the EU competence to act to attain freedom of establishment as regards a particular activity, in particular "*by coordinating to the necessary extent the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or forms within the meaning of the second paragraph of Article 54 TFEU with a view to making such safeguards equivalent throughout the Union*". The combination with Article 114 TFEU, designed to address the described internal market barriers comprehensively, does not *per se* alter this connection, which is already present in other company law texts, such as the shareholder rights directive. Substantively, this linkage to company law, which some might question by seeing in due diligence requirements specific tort law rules or public regulation,[49] seems justified by the horizontal aspect of the obligations enshrined, the direct application conferred on international standards of behaviour which are not a priori endowed with them, the inclusion of the interests of affected third parties among the fundamental objectives of company law, which here perhaps explains the exceptional application of certain rules to non-national companies. It nonetheless represents an unusual extension of the scope of company law, which has previously focused principally on corporate governance issues, such as organisational structure, decision-making processes and limited external concerns, including those related for example to rights and interests of direct company creditors. The extension of company law to impose preventive obligations protecting additional private or public actors and the environment, fully in line with the core philoshopy of CSR, is certainly a significant development, which blurs the boundaries with external public regulation.

This directive proposal also contemplated to include provisions on directors' duties and sustainable corporate governance. The European Commission had already set out this idea in its 2018 "*Action plan on financing sustainable growth*". Building on the work of the High-Level Expert Group on Sustainable Finance, the Commission stated that it would carry out analytical and consultative work with relevant stakeholders to assess: (i) the possible need to require corporate boards to develop and disclose a sustainability strategy, including appropriate due diligence throughout the supply chain, and measurable sustainability targets; and (ii) the possible need to clarify the rules according to which directors would be expected to act in the company's long-term interest. Following this path, in 2019, the Commission invited the European Supervisory Authorities to collect evidence of undue short-term pressure from capital markets on corporations[50] and commissioned EY to carry out a study on directors' duties and sustainable

[47] Proposal, p. 3.

[48] Proposal, Art. 15. Comp. in France, the much more circumscribed obligation for NFRD companies, introduced by the Law n° 2021-1104 of 22 August 2021 "*on combating climate change and strengthening resilience to its effects*" (JORF n° 196 of 24 August 2021), to adopt a plan to reduce direct and indirect greenhouse gas emissions and indirect greenhouse gas emissions related to transport activities (Code of commerce, Art. L. 225-102-1 III).

[49] See G. Ferrarini, Corporate Sustainability Due Diligence and the Shifting Balance between Soft Law and Hard Law in the EU, OBLB, 22 April 2022.

[50] See Report Undue short-term pressure on corporations, ESMA30-22-762 | 18 December 2019; EBA Report on undue short-term pressure from the financial sector on corporations, 18 December 2019; Potential undue short-term pressure from

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corporate governance, with the view of gathering evidence of a possible trend towards short-term shareholder value maximisation by EU companies, of investigating the main factors contributing to this trend and of analysing how a possible reform of company law and board duties could contribute to greater accountability for sustainable value creation.

The EY report, dated July 2020, purported to provide evidence that there exists "a trend for publicly listed companies within the EU to focus on short-term benefits of shareholders rather than on the long-term interests of the company"[51]. Data collected over the 1992-2018 period allegedly indicates "an upward trend in shareholder payouts, which increased fourfold, from less than 1% of revenues in 1992 to almost 4% in 2018. Moreover, the ratio of CAPEX and R&D investment to revenues has been declining since the beginning of the 21st century". According to the report, corporate "short-termism" finds its root, at least to some extent, in regulatory frameworks and market practices, which "work together to promote a focus on short-term financial return rather than on long-term sustainable value creation". Seven "problem drivers" were identified: 1. Directors' duties and company's interest are interpreted narrowly and tend to favour the short-term maximisation of shareholder value; 2. Growing pressures from investors with a short-term horizon contribute to increasing the boards' focus on short-term financial returns to shareholders at the expense of long-term value creation; 3. Companies lack a strategic perspective over sustainability and current practices fail to effectively identify and manage relevant sustainability risks and impacts; 4. Board remuneration structures incentivise the focus on short-term shareholder value rather than long-term value creation for the company; 5. The current board composition does not fully support a shift towards sustainability; 6. Current corporate governance frameworks and practices do not sufficiently voice the long-term interests of stakeholders; 7. Enforcement of the directors' duty to act in the long-term interest of a company is limited. An EU policy intervention was therefore advocated "to lengthen the time horizon in corporate decision-making and promote a corporate governance that is more conducive to sustainability" ; "only EU action can ensure a level playing field for European companies", since it alone "seems to have the prerequisite scale and scope needed to achieve a higher level of corporate responsibility for long-term sustainable value creation and to set a minimum common ground for dealing with sustainability while avoiding market distortions". Thus, as with due diligence obligations, legally binding provisions would be required in light of perceived limitations of softer alternatives.[52]

Rarely has a preliminary report to the EC raised as much criticism from the academia and business organisations! Criticism focused on the study's allegedly fundamental deficiencies in understanding capital market dynamics, company law and practices mischaracterisations, a subpar methodology and economic literature selection biases, all to satisfy the Commission's preconceptions[53]. Rather disturbingly, the Commission clearly did not take these criticisms into

financial markets on corporates: Investigation on European insurance and occupational pension sectors, EIOPA-BOS-19-537, 18 December 2019.

[51] Study on directors' duties and sustainable corporate governance, EY Final report, July 2020 https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance

[52] "evidence shows that mandatory reporting was not sufficient to mainstream good practices to a satisfactory level", Commission Staff Working Document, Impact Assessment Report, Annex 13.

[53] See among others, Law and Business Professors' Submission to the EU on EY's "Study on directors' duties and sustainable corporate governance". Response to the European Commission's call for feedback on its Sustainable Corporate Governance initiative, October 8, 2020; M. Bianchi, M. Milič, The Unconvincing Analysis and Conclusions of the Ernst & Young Study, OBLB, 13 Oct. 2020; M.J. Roe, H. Spamann, J. Fried, C. Wang, The European Commission's sustainable corporate governance report: A Critique, OBLB, 20 Oct. 2020; J. Fried, C. Wang, Short-Termism, Shareholder Payouts, and Investment in the EU, Harvard Business School, October 2020; Levée de boucliers contre un rapport européen sur la gouvernance durable, Les Échos, 21 oct. 2020; A Response From the Copenhagen Business School', OBLB, 26 Oct. 2020; J.C. Coffee, Jr., The European Commission Considers 'Short-Termism' (And 'What Do You Mean By That?'), OBLB, 17 Nov 2020; J. Fried, C. Wang, Le capitalisme durable menace la durabilité des entreprises. Les Échos, 18 Dec. 2020; M.J. Roe, H. Spamann, J. Fried, C. Wang, The sustainable corporate governance initiative in Europe, 38 Yale J. on Reg. Bull. 133, Yale Journal on Regulation Bulletin, 2021; A. Pietrancosta, in Aefinfo.fr, 13 Jan. 2021.

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account in the questionnaire it submitted for public consultation a few days later,[54] whose equally reproachful wording reflected the initial biases to get the parties consulted to validate the Commission's preferred options[55]. At the same time, in the European Parliament, beside a report on due diligence and corporate accountability, a separate report on sustainable corporate governance was published in September 2020, which provided for the clarification of the directors' duties of large undertakings, publicly listed SMEs and SME undertakings operating in high-risk sectors, in relation to sustainability[56]. It appeared particularly intrusive in terms of governance, since it provided for the obligation to engage with stakeholders through an advisory committee that could conduct an internal investigation if there were difficulties in implementing the sustainability strategy; proposals on executive remuneration, share buy-backs and dividends; or the intention to hold stakeholder general meetings.

Fortunately, a number of opposing forces played their part. In the European Parliament, ambitions had to be scaled back in order to secure a sufficient majority for a resolution asking the Commission to present a legislative proposal covering all EU listed and non-listed large undertakings and also non-EU companies operating in the EU market, "*to ensure that directors' duties cannot be misconstrued as amounting solely to the short-term maximisation of shareholder value, but must instead include the long-term interest of the company and wider societal interests, as well as that of employees and other relevant stakeholders*"[57]. At national level, in addition to the criticism of such an attack on the market economy and shareholders, which runs counter to efforts to strengthen their influence in previous company law directives, and the concern raised by the post-Brexit lawmaking process, many Member States denounced the inappropriateness, or even the illegality, of the European Commission's use of the climate issue to justify breaking the consensus on the principle of subsidiarity in corporate governance. This consensus is based on the idea that it is difficult to impose a meaningful common framework on corporate governance across the EU, for obvious reasons of different national regulations, traditions and cultures. On behalf of industry, a joint letter was published on 3 May 2021 by seven major business associations, which expressed concern that a European directive on sustainable corporate governance would be counterproductive, especially if it were to make corporate officers accountable to all stakeholders: not only is such a duty in itself impossible, but it also risks endangering EU competitiveness vis-à-vis companies based outside the European Union. Introducing legal requirements would place obligations on companies to reconcile conflicting interests, and any liability attached to such a requirement would lead to legal uncertainty and the risk of paralysing the functioning of the board and management. In the same month, the Regulatory Scrutiny Board issued a first negative technical opinion on the Commission's impact assessment,[58] to be followed by a second, unpublished opinion, dated of 26 November 2021.[59]

In the face of this resistance, the politically sensitive and strategic question arose as to whether there would be one or two proposals for a directive and, if there were only one, what would remain of the corporate governance component. Even though they may intersect, governance and due diligence are in reality different subjects and, as such, should be dealt separately: the first is a matter of pure company law, and may only be applicable to EU companies, whereas the second

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[54] See already the Inception impact assessment, dated of 30 July 2020, Ares(2020)4034032.

[55] ECLE, EC Corporate Governance Initiative Series: Comment by the European Company Law Experts Group on the European Commission's Consultation Document 'Proposal for an Initiative on Sustainable Corporate Governance', OBLB, 9 Dec. 2020.

[56] Draft report on sustainable corporate governance, Committee on Legal Affairs, 2020/2137(INI), Pascal Durand, 3 Sept. 2020.

[57] European Parliament resolution of 17 December 2020 on sustainable corporate governance (2020/2137(INI)), P9_TA(2020)0372.

[58] EC Regulatory Scrutiny Board, 7 May 2021, Ares(2021)3065513.

[59] SEC(2022)95.

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is similar to an economic police law, whose scope may be extended to non-EU companies operating in the EU.

The choice was finally made to include in the same text, in addition to general due diligence requirements and their subsequent specific duties, an Article 25 – strangely, but perhaps revealingly, relegated to the end of the text – that defines a general duty of care of corporate directors and executives. This includes, as does the French model on which it is based, "*taking into consideration*" the consequences of their decisions regarding sustainability matters, including human rights, climate change and environmental consequences, in the short, medium and long term. While the Commission refrained from going much beyond this general provision and therefore agreed to deviate "from the preferred options' package in the impact assessment",[60] one may expect that, as a result of its far-reaching scope, it will continue to raise national objections.[61]

8. In the meantime, and in accordance with an unfortunate practice that is fairly widespread in Europe, consisting of anticipating, often in order to influence the ongoing discussion of the European regulation, Germany[62] and Norway[63] have, at about the same time, in June 2021, adopted relatively general laws requiring human rights and decent work due diligence for large companies, albeit to a relatively different extent and spirit. The objective scope of application of these duties nevertheless lags behind that of the French law, in particular with regard to the environmental aspect, which seems much less inclusive in the German and Norwegian texts. And also for the absence of provisions relating to civil liability, whereas it is often argued that availability of a remedy is the most neglected of the three UN guiding principles on business and human rights pillars, and the global pattern is that victims of business-related human rights abuses in extraterritorial cases do not generally have access to effective remedies.

9. A second observation is that, as company lawyers, we can only be struck by the use and co-option in a new way of company law for general social and environmental purposes, the consequent politicisation of the role of companies and the mix of genres and confusion arising between public and private goals.[64] Companies are associated with and must bear the consequences of the commitments made by governments, in terms of protection of human rights or the environment.[65] As States and their governments are themselves bound by international

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[60] Proposal, p. 22.

[61] See e.g. Response to the Proposal for a Directive on Corporate Sustainability Due Diligence by Nordic and Baltic Company Law Scholars, NORDIC & European COMPANY LAW, LSN Research Paper Series, No. 22-01.

[62] See the Corporate Due Diligence in Supply Chains Act (*Lieferkettensorgfaltspflichtengesetz*) of 16 July 2021, published in the Federal Law Gazette (*Bundesgesetzblatt*) on 22 July 2021. The new law, which will apply from 1 January 2023, requires enterprises that have their central administration, principal place of business, administrative headquarters, statutory seat or branch office in Germany, to respect human rights by implementing defined due diligence obligations. It is applicable to German and foreign companies with more than 3,000 employees in Germany, lowered to 1,000 employees in January 2024. According to the Explanatory Memorandum on the act, this concerns approximately 600 companies in 2023 and 2,800 companies in 2024.

[63] Act relating to enterprises' transparency and work on fundamental human rights and decent working conditions (Transparency Act) of 10 June 2021, which will become effective on July 1st, 2022. It will require certain companies (meeting at least two of the three following criteria: annual turnover of at least NOK 70 million; balance of at least NOK 35 million NOK; average number of 50 full-time employees or the equivalent annual man-hours) selling products and services in Norway to carry out human rights due diligence in line with the OECD Guidelines.

[64] See already, T. Levitt, The dangers of social-responsibility, Harvard business review, 1958 Jan 1;36(5):41-50: "Government's job is not business, and business's job is not government. And unless these functions are resolutely separated in all respects, they are eventually combined in every respect. In the end the danger is not that government will run business, or that business will run government, but rather that the two of them will coalesce, as we saw, into a single power, unopposed and unopposable." In the same direction, but from another angle, see R.B. Reich, Supercapitalism: The Transformation of Business, Democracy and Everyday Life, Knopf, 2007.

[65] *Adde*, O. Favereau et B. Roger, Penser l'entreprise : un nouvel horizon du politique, éd. Paroles et silence, 2015 ; O. Favereau, Réformer l'entreprise, Études 2018/9, p. 55 ; T. Sachs, Les dangers d'une dilution du devoir de vigilance dans la

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standards of conduct that include prevention of various kinds of harm, particularly with regards to human rights abuse involving companies, they may try to minimise their non-compliance risks by passing their obligations of due diligence on to business enterprises. In environmental matters, States may even commit internationally and nationally to reach specific results,[66] some of which may require drastic changes whose burden is then largely passed on to companies, in the name of their contributing role.[67] Such "privatisation" of States' commitments reflects a policy choice to decentralise the means to achieve internationally defined global objectives or, more often than not, in light of the territorial, financial and political limits of State action, the States' role becomes reduced to imposing proactive duties on multinational enterprises commensurate to those enterprises' power and impact. As a matter of policy, this approach seeks to bridge the gap between the boundaries of national or regional legal requirements and the economic/social/environmental impacts of transnational firms. Technically, this may result in giving some direct effect to international agreements that do not by their terms seem to have such effect.[68] If, according to soft-law international standards, in particular the second pillar of the UNGPs, the corporate responsibility to respect human rights exists independently of the State duty to protect human rights, such decorrelation is indeed more difficult to conceive in hard law, which is expressed not in terms of abstract corporate responsibility, but in terms of specific legal duties. This result is in a sense realised indirectly, through specific prevention or remediation obligations which are often expressed as simple obligations of "means", but which, depending on the case, may be similar to obligations of "result" receiving a worldwide application, thus potentially conflicting with foreign national laws. By virtue of their mere legal or even economic attachment to the European Union, the companies concerned are thus made subject to mandatory international human rights and environmental norms of behaviour, from which they cannot depart by crossing borders. Internationally, as it entails the substitution of a foreign legal/judicial system through obligations imposed on private operators for allegedly failing national States, these legal duties contain a certain proactive extraterritorial element that some would characterise as overreaching at least, and perhaps imperialistic.[69] In all cases, company law is used because of

compliance, Revue de Droit du Travail, juin 2022, p. 352 : « l'entreprise considérée comme une entité politique est érigée en acteur des politiques des États ».

[66] See for the EU, regulation 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law'), OJEU, L 243/1, 9 July 2021: "*This Regulation sets out a binding objective of climate neutrality in the Union by 2050 in pursuit of the long-term temperature goal set out in point (a) of Article 2(1) of the Paris Agreement, and provides a framework for achieving progress in pursuit of the global adaptation goal established in Article 7 of the Paris Agreement. This Regulation also sets out a binding Union target of a net domestic reduction in greenhouse gas emissions for 2030.*"; regulation 2018/842 of the European Parliament and of the Council of 30 May 2018 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement and amending Regulation (EU) No 525/2013, OJEU, n° L 156/26, 19 June 2018. See e.g., in France, the judicial condemnation of the State, in a decision of 1 July 2021 ("Grande Synthe"), because its conflicts with obligations under the European regulation of 30 May 2018 and Article L. 100-8 of the Energy Code, which have expressly formulated a "*trajectory for reducing greenhouse gas emissions*", F.-X. Fort and C. Ribot, « Commune de Grande-Synthe » : tsunami juridique ou décision de circonstance ?, La Semaine Juridique Administrations et Collectivités territoriales n° 36, 6 sept. 2021, 2264 ; M. Torre-Schaub, Le contentieux climatique : du passé vers l'avenir, RFDA 2022 p. 75. In Germany, Art. 20a of the Basic Law obliges the state to take climate action, which includes the aim of achieving climate neutrality, see Constitutional court, BVerfG, Order of the First Senate of 24 March 2021 - 1 BvR 2656/18.

[67] It is rather noticeable in this respect to consider that the 2015 Paris Climate Agreement does not mention business enterprises once.

[68] On the lack of direct effect of the Paris Agreement, see Conseil d'État, 19 nov. 2020, n° 427301, Commune de Grande-Synthe, Lebon p. 406; Le « contrôle de la trajectoire » et la carence de l'État français à lutter contre les changements climatiques - Retour sur les décisions Grande-Synthe en passant par l'Affaire du siècle, AJDA 2021 p. 2115. Its content must, however, be "taken into consideration in the interpretation of the provisions of national law", *supra* Conseil d'État, decision of 1 July 2021 ("Grande Synthe").

[69] See J. Lacroix, J.-Y. Pranchère (2016), Le procès des droits de l'homme : généalogie du scepticisme démocratique, Éditions du Seuil.

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the significant influence it can have on business behaviour,[70] which optimists may view as reassuring and exciting, as company law is called to serve higher purposes, help solve what many consider monumental problems of our time and give effect to the highest human rights and environmental standards on a global scale. Those less optimistic may question, as a matter of public policy, the use and efficacy of these generalised precautionary measures intermediated by company leaders, rather than direct regulatory measures targeting specific social or environmental issues. This may even create an illusion that these issues are already appropriately taken care of and delay perhaps the necessary policy measures.[71] Some may also view this move as an attempt by big business to pre-empt more demanding and costly specific regulation. The flip side is that, since these legal provisions are formulated in a very general manner, they create a great deal of legal uncertainty for companies and have the additional disadvantage of fuelling criticism, disputes and litigation under them. This vagueness often seems to reflect the origins of the approach to the current law in international human rights/environment oriented-soft regulation, which has not been subject to the necessary translation into language in hard law.

10. A final observation concerns the similarities and differences between the two laws in question. General speaking, these laws share the values and articulate the requirements that are usually associated with responsible business conduct.[72] These start with an enhanced awareness and perception of risks and expectations of others, which is admittedly the beginning of responsibility. They then imply a degree of personal discipline or repression and a corresponding consideration of the consequences and repercussions of one's actions and inactions, the possibilities of alternative behaviours and the ability to justify the choices made.

More technically, however, there are important differences in scope and spirit between the laws in question. They differ significantly in scope. Both French laws apply only to French companies: the 2017 law, to large joint-stock companies; the 2019 law, to all companies, regardless of their size or corporate form. Instead of instituting, as in France, a "duty of vigilance" for some and an "enlightened" company interest standard for all, the European Commission proposes to limit the CS3D scope to large EU companies and to extend due diligence requirements for large non-European companies.

The two laws differ as well in spirit: the 2017 law on the duty of vigilance is a risk mitigation law: even if it does so in an elaborate way, it basically expresses a no-harm duty; by contrast, the 2019 law aims to ensure the promotion of the common good by obliging managers to move towards a long-term alignment of what it assumes are common interests of shareholders and stakeholders. The latter is driven by political objectives that are more ambitious, both theoretically and legally. Its aim is no less than to "rethink the place of companies in society" and help France have companies that are "fairer", more socially responsible and long-term oriented. The European proposal on CSDD clearly drew its inspiration from the two laws mentioned above. It openly draws upon the French conception of a duty of vigilance, while being more detailed and threatening, reflecting international standards or other national models (Part I) and embraces the idea of a general company-law duty to take into account social and environmental factors, while leaving aside the optional elements of French law linked to the use of a *raison d'être* or to alternative company models (Part II).

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[70] "Laws and policies that govern the creation and ongoing operation of business enterprises, such as corporate and securities laws, directly shape business behaviour.", UNGPs, p. 6.

[71] See L.A. Bebchuk and R. Tallarita, The illusory promise of stakeholder governance, Working Draft, March 2020 and Will Corporations Deliver Value to All Stakeholders?, Forthcoming, Vanderbilt Law Review, Volume 75 (May 2022); L.E. Strine, The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law, 50 Wake Forest L. Rev. 761 (2015).

[72] See C.D. Stone, Where the Law Ends, Harper Torchbooks, 1975.

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PART I. THE FRENCH « DUTY OF VIGILANCE » AND THE EUROPEAN PROPOSAL ON COMPANIES' DUE DILIGENCE DUTIES

11. A presentation of the genesis of the French duty of vigilance and the proposal for its generalisation in Europe (A) will precede a comparison of their respective contents (B).

A. THE GENESIS OF THE FRENCH "DUTY OF VIGILANCE" AND THE PROPOSED EUROPEAN GENERALISATION OF "DUE DILIGENCE REQUIREMENTS"

12. The concept of vigilance, a duty to seek to prevent harm, has long been recognised in international public law, where it has been enshrined since the 1940s.[73] It is, however, much less common for private law to impose such affirmative duties.[74] In France, it has made a spectacular breakthrough with the law No. 2017-399 of 27 March 2017, which imposes on large French corporations a general duty of vigilance that covers almost the whole spectrum of CSR issues and tries to apprehend all the negative externalities generated by economic activity.[75] France is proud to distinguish itself as the first country in the world to experiment with such a general mandatory due diligence requirement.[76] Paradoxically, this "best known and most far-reaching" regime of

[73] The idea of vigilance first appeared with the Fonderie de Trail sentence between Canada and the United States, and was subsequently taken up by the International Court of Justice and, more recently, by the European Court of Human Rights.

[74] See more generally, T. Koivurova, Due Diligence, in Rüdiger Wolfrum (ed.), Max Planck Encyclopaedia of Public International Law, 2010, § 3.

[75] See J. Lagoutte, Le devoir de vigilance des sociétés mères et des sociétés donneuses d'ordre ou la rencontre de la RSE et de la responsabilité juridique, Responsabilité civile et assurances, n° 12, Décembre 2015, étude 11, n° 3; S. Brabant, E. Savourey, French Law on the Corporate Duty of Vigilance, Revue internationale de la compliance et de l'éthique des affaires – supplément à la Semaine juridique entreprise et affaires n° 50 du jeudi 14 décembre 2017, p. 1; T. Beau de Loménie, S. Cossart, Stakeholders and the Duty of Vigilance, ibid.; Le devoir de vigilance des sociétés mères et entreprises donneuses d'ordre après la loi du 27 mars 2017, in Dossier Le devoir de vigilance : Dr. soc. n° 10/2017, p. 806; S. Schiller, Exégèse de la loi relative au devoir de vigilance des sociétés mères et entreprises donneuses d'ordre : JCP E 2017, 11933; K. Martin-Chenut, Devoir de vigilance, internormativités et durcissement de la RSE : Dr. soc. 2017, p. 758; J. Heinich, Devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre : une loi finalement adoptée, mais amputée, Droit des sociétés n° 5, Mai 2017, comm. 78; M.-A. Moreau, L'originalité de la loi française du 27 mars 2017 relative au devoir de vigilance dans les chaînes d'approvisionnement mondiales », in Dossier Le devoir de vigilance : Dr. soc. n° 10/2017, p. 792-797; B. Parance, La consécration législative du devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre : Gaz. Pal. 18 avr. 2017, n° 15, p. 16; Compliance & transparence en 2018 », dir. S. Schiller et P.-L. Périn, Actes pratiques et Ingéniérie sociétaire, n° 157, janv.-févr. 2018, p. 3 s.; J.-B. Tap, Le devoir de vigilance, un nouvel horizon, Revue de jurisprudence commerciale – Janvier / Février 2018 – n° 1; Le devoir de vigilance des entreprises nationales », dir. L. d'Ambrosio et P. Barraud de Lagerie : Dr. et société n° 106, 2020, p. 633; S. Cossart, T. Beau de Loménie, A. Lubrani, Extension du domaine de la vigilance : la loi sur le devoir de vigilance, au-delà de la compliance : RJSP 2019, n° 16, p. 88; C. Coslin, M. Renard, Du droit souple au droit dur : le devoir de vigilance et la responsabilité civile des entreprises en matière de droits humains, Droit & Affaires, 2019, 16e éd., p. 189; O. Petitjean, Devoir de vigilance. Une victoire contre l'impunité des multinationales, Éditions Charles Léopold Mayer, 2019; Le devoir de vigilance, LexisNexis, 2019; C. Coupet, Le printemps des devoirs de vigilance, BJS 2021, n° 4, p. 1; P.-L. Périn, Hugo Pascal, Evangéline Mure, Devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, JurisClasseur Sociétés Traité, Fasc. 2450, 2022.

[76] "The 2017 French Duty of Vigilance law490 is the only legislative example to date which imposes a general mandatory due diligence requirement for human rights and environmental impacts.", Study on due diligence requirements through the supply chain, EC, January 2020, p. 170.

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mandatory due diligence[77] is a short piece of legislation: only 3 articles, 2 included in the French Commercial Code (Art. L. 225-102-4, Art. 225-102-5).

13. **In a nutshell**. The French corporate duty of vigilance law establishes a legally binding obligation for large French corporations to assess and mitigate the risks of serious harm to people and the environment. As a main requirement, such corporations are required to establish, implement and publish in essence a "*vigilance plan*". This plan must include reasonable measures to identify risks and prevent serious harm to human rights and fundamental freedoms, the health and safety of persons and the environment, through their whole supply chain, meaning resulting from company, subsidiary, supplier and subcontractor activities. These harms are not legally defined. The law does not even say how should these corporations deal with different local legal requirements. In international situations, the basic principle is that group companies must comply with local law.[78] The new legal duty, however, requires companies to take steps to address relevant harms, regardless of whether they are permitted or prohibited by the laws of the countries where they take place.[79] Civil liability would apply when companies default on their obligations, including the absence of a plan or faults in its implementation. "Any interested parties – including affected people and communities – are empowered to hold companies accountable. They can require judicial authorities to order a company to establish, publish and implement a vigilance plan".[80] Such parties may also bring civil liability lawsuits against companies and ask for compensation if the violation of these legal requirements has caused harm.

14. **Narrative**. For many years, there have been documented abuses by transnational corporations, which allegedly demonstrate that the national and international legal frameworks or voluntary standards do not always allow for economic players to be held responsible when it comes to human rights or for payments of damages to be claimed wherever they may have occurred in the world,[81] and that a legally binding framework is necessary "where achieving corporate accountability is hindered by: the complexity, scale and reach of corporate structures; the absence of a level playing field; the legal and practical barriers faced by victims to access remedies;[82] or the lack of enforcement of existing standards especially concerning transnational corporations with a myriad of subsidiaries and suppliers" in multiple jurisdictions. The tragedy in Bhopal, India, the dumping of toxic waste in the Ivory Coast, the pollution caused by the Erika tanker on the French coast or the much-publicised collapse of the Rana Plaza in Bangladesh are well-known and dramatic examples of this.

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[77] OHCHR, 'UN Human Rights "Issues Paper" on legislative proposals for mandatory human rights due diligence by companies' (June 2020), p 3, https://www.ohchr.org/Documents/Issues/Business/MandatoryHR_Due_Diligence_Issues_Paper.pdf.

[78] See the 2018 OECD Due Diligence Guidance for Responsible Business Conduct. Comp. ISO 26000, Guidance on social responsibility, 4.6 *sq.*

[79] Study on due diligence requirements through the supply chain, EC, January 2020, p. 266.

[80] French Corporate Duty Of Vigilance Law, Frequently Asked Questions, European Coalition for Corporate Justice, Brussels, Belgium, 23 February 2017.

[81] In 2018, the Corporate Human Rights Benchmark assessed 101 of the largest publicly traded companies in the world across three industries (agricultural products, apparel and extractives). The findings of the assessment depict a 'deeply concerning' picture, with the majority of companies scoring poorly on the Benchmark, and an alarming 40% of companies scoring no points at all across the human rights due diligence section of the assessment, See A. Marx, C. Bright and J. Wouters, "Access to Legal Remedies for Victims of Corporate Human Rights Abuses in Third Countries, 2019, p. 107, available at: http://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU(2019)603475_EN.pdf.

[82] See A. Marx, C. Bright and Jan Wouters, op. cit.; A. Marx, C. Bright, N. Pineau and J. Wouters, Corporate Accountability Mechanisms in EU Member States for Human Rights Abuses in Third Countries, European Yearbook on Human Rights (forthcoming, 2019); OHCHR, "Improving accountability and access to remedy for victims of business-related human rights abuse: the relevance of human rights due diligence to determinations of corporate liability", UN Doc. A/HRC/38/20/Add.2 (1 June 2018) at 19; Study on due diligence requirements through the supply chain, EC, January 2020, p. 228.

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For France, the establishment of such a mandatory duty of vigilance implements legally its commitment to the 2011 United Nations' Guiding Principles on Business and Human Rights, which are currently the internationally recognised standard of reference on this matter,[83] along with the OECD guidelines for multinational enterprises, revised in 2011 to align with the UNGPs but which extend to other areas (including environment and climate change, as well as risks related to conflict, labour rights, bribery and corruption, disclosure and consumer interests).[84] This helps underline once again the recent tendency of the States under various regimes to delegate some of their responsibilities in certain areas to companies, or at least to involve them in discharging their own duties.

15. **Counterpoint**. Needless to say, this proposed reform has raised many criticisms.[85] Initially, it was not taken seriously by many business organisations. It has to be said that, contrary to the usual way laws are made in France, the draft was not conceived in government departments, but by a small group of MPs independent of the government, in close collaboration – which is even rarer – with a coalition of associations, trade unions and other stakeholders from the so-called "civil society".

As for the main points of criticism, it was argued that:

1) The major French groups have already been developing and implementing such vigilance strategies for many years. They are among the most compliant with international ethical and environmental standards[86] in terms of human rights, environmental protection and the fight against corruption and adhere to the principles of the OECD and the UN.[87]

2) Voluntary CSR commitments already produce normative effects. "The top incentive for undertaking due diligence was reputational risks (66.19% for business respondents, 65.52% for industry organisations), followed by investors requiring a high standard (51.08% for business respondents, 55.17% for industry organisations), and consumers requiring a high standard (46.76% for business respondents, 55.17% for industry organisations)."[88]

3) Contrary to what was said during the preparatory work, no other country to our knowledge imposes such a broad obligation on its companies.

4) Such a piece of legislation would impose both considerable and ill-defined obligations on French companies, thereby distorting international competition, creating major legal uncertainty and seriously undermining the attractiveness of the French jurisdiction and territory without at the same time achieving the objectives of strengthening the protection of human rights, social rights and the environment.

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[83] Study on due diligence requirements through the supply chain, EC, January 2020, p. 158 s.

[84] Unanimously passed by the United Nations Human Rights Council in 2011, these non-binding guidelines affirm: the central role of the government in the protection and promotion of human rights in companies, the priority of a risk-based approach for third parties and the extended liability within the value chain, and emphasise that it is mandatory for companies to respect human rights by recognising that their liability extends to their business dealings as a whole.

[85] Se eg., A. Pietrancosta, É. Boursican, Vigilance: un devoir à surveiller !, JCP G 11 mai 2015, p. 553; Devoir de vigilance, la punition plutôt que la confiance, L'Opinion, 22 Feb. 2017; D. de Saint-Affrique, De l'opportunité de légiférer sur le devoir de vigilance : choix compassionnel pertinent ou inadapté ?, La Semaine Juridique Entreprise et Affaires n° 5, 2 février 2017, 1064; C. Malecki, Le devoir de vigilance des sociétés mères et entreprises donneurs d'ordres : était-ce bien raisonnable ?, Bull. Joly Sociétés, mai 2017, p. 298; A. Reygrobellet, Devoir de vigilance ou risque d'insomnies ?, Revue Lamy Droit des affaires, nº 128 juillet/août 2017, p. 35.

[86] See EcoVadis, « Comparatif de la performance RSE des entreprises françaises avec celle des pays de l'OCDE et des BRICS », Édition 2019.

[87] According to SHIFT, the average level of reporting would be 2.5 on a scale of 5 for French multinationals, against only 2 for those in the rest of the world (taken from the UNGP Reporting Database which includes 130 multinational companies). Similarly, in terms of human rights, the IGEO EIRIS analysis shows that European companies, led by France, are better rated than those in the rest of the world.

[88] Study on due diligence requirements through the supply chain, EC, January 2020, p. 89.

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5) This legislation does not only concern large companies: in practice, outsourcing companies will be led to impose on their subcontractors, primarily French SMEs, constraints that do not exist in other countries, thereby penalising the French entrepreneurial fabric.

6) This law can have adverse effects on suppliers and subcontractors of French companies in emerging countries. Companies could be tempted to turn to less-risky global suppliers, to the detriment of the development of local businesses.[89]

7) The broad legal standing granted to any interested person anywhere in the world to sue French companies dramatically increases the litigation risk for them and in practice establishes associations and NGOs as "private prosecutors", of whom no normal obligations of transparency, proper conduct, good repute, etc. are required.

Unfortunately, as the text was of parliamentary origin, it escaped the normal constitutional obligation to be accompanied by an impact assessment, which is only required for government projects. This again shows the importance to extend the impact assessment requirement to any legal or regulatory norms of significant importance, whatever its source, to avoid the temptation to use easy ways to circumvent it.

16. **Softening amendments**. Some of the above and other criticisms were taken into account, with a softened, amended version. Voluntarily, at first. Thanks to a change in the national political environment, some of the bill's requirements were relaxed, under the supervision of President Emmanuel Macron. In particular, the idea of creating a presumption of wrongdoing on the part of companies in the event of harm, a criminal offence or a class action mechanism were both abandoned. Other amendments were imposed by the French Constitutional Council. They mainly concern the imposition of new obligations, including civil penalties of 10 or 30 million euros for non-compliant companies. These penalties were applicable in two different sets of circumstances: failure to comply with the requirements to draw up a vigilance plan (existence and content) exposed the company to a civil fine of a maximum of EUR 10 million; in case of harm, the absence or failure of a plan that would have allowed avoiding the harm exposed the infringer to a penalty up to EUR 30 million, in addition to a right to obtain compensatory damages for the harm caused.

These civil penalties of 10 or 30 million euros were declared unconstitutional by the French Constitutional court in a decision dated March 23, 2017, ironically because they were found to be in violation of the French Declaration of human rights, more specifically Art. 8, which states that "*The Law must prescribe only the punishments that are strictly and evidently necessary; and no one may be punished except by virtue of a Law drawn up and promulgated before the offense is committed, and legally applied*." The Constitutional Council decided that the terms of the offences were too vague and general to sustain sanctions of a punitive nature.

This weakening of the content of the law has been strongly criticised by the human rights and environmentalist lobbies, which therefore consider that this is only half a victory and that the fight is not over on the legal front.[90] Reported public evaluations of the law have also favoured extending and tightening the current legal regime.[91]

17. **Internationalisation**. As for the "no-other-country" argument, the main promoters of the text took pride in it rather than circumspection in the hope that others will follow the French

[89] See General Council of the Economy, Évaluation de la mise en œuvre de la loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, rédigé par Mme A. Duthilleul et M. M. de Jouvenel, Jan. 2020, www.economie.gouv.fr/files/files/directions_services/cge/devoirs-vigilances-entreprises.pdf, p. 38.

[90] V. O. Petitjean, Devoir de vigilance. Une victoire contre l'impunité des multinationales, Éditions Charles Léopold Mayer, 2019.

[91] See General Council of the Economy, op. cit.; Rapport d'information par la commission des lois constitutionnelles, de la législation et de l'administration générale de la République sur l'évaluation de la loi du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, Ass. nat., n° 5124, 24 février 2022.

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example, meant by its proponents to be the lighthouse of responsible capitalism, if not civilisation itself. It is true that "in the past years, this question has gained important political momentum, and initiatives to improve corporate accountability have increased at the national, European and international level."[92] Following the well-known principle of self-fulfilling prophecy, France has since been playing a leading role in the adoption of international liability rules and presents itself as a model.[93]

At national level, initiatives have indeed multiplied regarding due diligence requirements. According to the European Commission, they have been discussed or adopted in 13 countries, of which 11 are EU Member States (Austria, Belgium, Denmark, Finland, France, Germany, Italy, Luxembourg, the Netherlands, Sweden and the United Kingdom; the remaining two are Norway and Switzerland),[94] although, to our knowledge, they do not reach the breadth in scope of the French duty of vigilance.

At the international level, a United Nations legally binding instrument to impose on transnational corporations due diligence requirements to prevent human rights violations, has been in preparation since 2014 and is still under discussion.[95] After several rounds of discussion, a third revised draft treaty entitled "*Legally Binding Instrument to Regulate in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises*" was published in August 2021,[96] i.e., 10 years after the adoption of the non-legally binding UNGPs, which themselves were adopted after 30 years of unsuccessful efforts to negotiate a convention on rights and duties of multinational enterprises. Regarding prevention, this treaty, if adopted, would impose on States Parties to « *take appropriate legal and policy measures to ensure that business enterprises, including transnational corporations and other business enterprises that undertake activities of a transnational character, within their territory, jurisdiction, or otherwise under their control, respect internationally recognized human rights and prevent and mitigate human rights abuses throughout their business activities and relationships*" (Art. 6.2). "*For that purpose*", States Parties would "*require business enterprises to undertake human rights due diligence, proportionate to their size, risk of human rights abuse or the nature and context of their business activities and relationships, as follows: a. Identify, assess and publish any actual or potential human rights abuses that may arise from their own business activities, or from their business relationships; b. Take appropriate measures to avoid, prevent and mitigate effectively the identified actual or potential human rights abuses which the business enterprise causes or contributes to through its own activities, or through entities or activities which it controls or manages, and take reasonable and appropriate measures to prevent or mitigate abuses to which it is directly linked through its business relationships; c. Monitor the effectiveness of their measures to prevent and mitigate human rights abuses, including in their business relationships; d. Communicate regularly and in an accessible manner to stakeholders, particularly to affected or potentially affected persons, to account for how they address through their policies and measures any actual or potential human rights abuses that may arise from their*

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[92] The French Duty of Vigilance Law - Frequently Asked Questions, European Coalition of Corporate Justice, 23 February 2017.

[93] See C. Clerc, The French 'Duty of Vigilance' Law: Lessons for an EU directive on due diligence in multinational supply chains, ETUI, The European Trade Union Institute, 15 Jan. 2021 and Legislation of EU Supply Chain Due Diligence Act: Current Status, International Labor Brief, Nov. 2021.

[94] Study on due diligence requirements through the supply chain, EC, January 2020, p. 40 et s. and 170 et s. ; National movements for mandatory human rights due diligence in European countries, Business & Human Rights Resource Centre, Published on: 22 May 2019, https://www.business-humanrights.org/en/national-movements-for-mandatory-human-rights-due-diligence-in-european-countries. *Adde*, *supra* n° 4.

[95] Human Rights Council, 'Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights' (2014) A/HRC/ Res. 26/9.

[96] OEIGWG Chairmanship, 'Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises' (3rd Revised Draft, 2021).

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activities including in their business relationships" (Art. 6.3).[97] "*States Parties may provide incentives and adopt other measures to facilitate compliance with requirements under this Article by micro, small and medium sized business enterprises*" (Art. 6.5). "*Without prejudice to the provisions on criminal, civil and administrative liability under Article 8, States Parties shall provide for adequate penalties, including appropriate corrective action where suitable, for business enterprises failing to comply*" (Art. 6.7). While the adoption of this third draft is a sign of significant developments and has raised some hopes on the part of its supporters, no doubt helped by the evolution of the treatment of these issues at national or regional levels, the chances of a successful outcome are still overshadowed by major differences of opinion among States, particularly on the part of the USA, Japan or the United Kingdom, which have advocated alternative approaches to binding obligations and liabilities against transnational corporations' human rights abuses.[98]

18. **Towards a European directive**. At the European level, the Commission's proposal on CSDD, published on the 23rd of February 2022, is informed by and built on the French model. The two articles of the French Commercial Code are expanded to some thirty articles in the EU proposal, setting out the obligations of due diligence to be imposed on a wider range of companies, including non-European ones operating in Europe, regarding actual and potential human rights and environmental adverse impacts, with respect to their own operations, the operations of their subsidiaries and the value chain of operations carried out by entities with whom companies have established direct or indirect business relationships.

More innovative is the obligation for the largest EU and non-EU qualifying companies[99] to "*ensure*" that their business models and strategies are "*compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5°C in line with the Paris Agreement*"[100]; to include "*emission reduction objectives in its plan*", "*in case climate change is or should have been identified as a principal risk for, or a principal impact of, the company's operations*"; and to duly take into account the fulfilment of these two obligations "*when setting variable remuneration, if variable remuneration is linked to the contribution of a director to the company's business strategy and long-term interests and sustainability*".[101] This is a far cry from the French obligation to request large private entities or listed companies to disclose publicly the

[97] "*States Parties shall ensure that human rights due diligence measures undertaken by business enterprises shall include: a. Undertaking and publishing regular human rights, labour rights, environmental and climate change impact assessments throughout their operations; b. Integrating a gender perspective, in consultation with potentially impacted women and women´s organizations, in all stages of human rights due diligence processes to identify and address the differentiated risks and impacts experienced by women and girls; c. Conducting meaningful consultations with individuals or communities whose human rights can potentially be affected by business activities, and with other relevant stakeholders, including trade unions, while giving special attention to those facing heightened risks of business-related human rights abuses, such as women, children, persons with disabilities, indigenous peoples, people of African descent, older persons, migrants, refugees, internally displaced persons and protected populations under occupation or conflict areas; d. Ensuring that consultations with indigenous peoples are undertaken in accordance with the internationally agreed standards of free, prior and informed consent; e. Reporting publicly and periodically on non-financial matters, including information about group structures and suppliers as well as policies, risks, outcomes and indicators concerning human rights, labour rights, health, environmental and climate change standards throughout their operations, including in their business relationships; f. Integrating human rights due diligence requirements in contracts regarding their business relationships and making provision for capacity building or financial contributions, as appropriate; g. Adopting and implementing enhanced human rights due diligence measures to prevent human rights abuses in occupied or conflict-affected areas, including situations of occupation*" (Art. 6.4).

[98] On the recommendation of a French official position in favour of such a treaty, see Rapport Ass. Nat., n° 5124, op. cit., p. 89.

[99] I.e. group 1 companies.

[100] Proposal, Art. 15.

[101] Note that companies subject to the CSRD will have to publicly disclose "*information about the existence of incentive schemes offered to members of the administrative, management and supervisory bodies which are linked to sustainability matters*".

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measures taken to reduce their carbon footprint.[102] While the European obligation is intended to provide a substantive basis for the disclosure requirement present in the forthcoming CSRD,[103] a literal reading of its strict requirements contrasts with the means-based due diligence requirements. Indeed, it seems to lead to a meta-obligation with respect to climate impact results, exceeding what the Paris Agreement actually requires,[104] which would condition the legal and economic survival of each subject company, without regard to its objective ability to reduce its emissions to specific levels, the materiality of such emissions on global climate change limitation targets, reinforced by the risk of circumvention (consisting for a qualifying company, for example, in merely selling its affected business to a non-qualifying company) or its otherwise positive contributions. Undoubtedly, Article 15 will attract much attention and criticism,[105] as what could be an unconditioned "death-penalty" sanction may appear disproportionate and therefore legally questionable with respect to the freedom of enterprise protected by the Charter of fundamental rights of the European Union and the many Member States' constitutions.

Responding to the need for legal certainty and to provide support to companies or to Member State authorities, the proposed Directive would require the Commission to adopt guidance about non-binding model contract clauses to help companies' compliance and the possibility for the Commission to issue guidelines, for specific sectors or specific adverse impacts.[106] For their part, the Member States and the Commission will set up and operate, individually or jointly, dedicated websites, platforms or portals.

Enforcement of these provisions would be based on the mandatory designation of one or more national supervisory authorities with appropriate powers and resources, and a European Network of Supervisory Authorities aiming to facilitate and ensure the coordination and alignment of regulatory, investigative, sanctioning and supervisory practices, and the sharing of information among these supervisory authorities.

Civil liability rules are also provided for damages arising from the companies' failure to comply with the due diligence obligations under specific conditions. Member States would have two years to incorporate the Directive into their national law.

B. THE FRENCH VIGILANCE AND THE EUROPEAN DILIGENCE COMPARED

19. This comparison highlights the common inspiration of the French and European texts, but also the ambition of the European Commission to go beyond the French model in developing a more inclusive, elaborate and better-enforced legal regime. These features will be verified through a comparison of their respective scope (1.), content (2.) and sanctions (3.).

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[102] *Supra* n° 4.

[103] Although the final wording of the CSRD proposal not only requires disclosure of "*the plans of the undertaking, including implementing actions and related financial and investment plans, to ensure that its business model and strategy are compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5 °C in line with the Paris Agreement*", but also to "*the objective of achieving climate neutrality by 2050 as established in Regulation (EU) 2021/1119 (European Climate Law*".

[104] See the Paris Agreement, Art. 2, setting its objective to include: "*Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels*".

[105] See Response to the Proposal for a Directive on Corporate Sustainability Due Diligence by Nordic and Baltic Company Law Scholars, art. prec.

[106] See table in Impact assessment, Annex 18.

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1. PERSONAL SCOPE

20. The **French duty of vigilance** applies to all types of commercial stock corporations (ordinary stock corporations (*sociétés anonymes* - SA), joint-stock limited partnerships (*sociétés en commandite par actions* - SCA), European companies (*sociétés européennes* - SE); simplified stock corporations (*sociétés par actions simplifiées* - SAS)[107]) registered in France. This restriction to only stock companies has been criticized as making little sense considering the purpose of the law.[108] In concrete terms, it allows certain companies, organized as other than stock companies to avoid this legal obligation: Zara France (*société à responsabilité limitée* – SARL/LLC), H&M Hennes & Mauritz (SARL), Peugeot Citroën Sochaux (*société en nom collectif* – SNC/general partnership) or Lidl (SNC). As some of the excluded companies are themselves limited liability ones, it appears that the French legislature did not conceive of the duty of vigilance as a condition to receiving the legal advantage of limited liability granted to shareholders.

A second condition is that, at the end of two consecutive financial years, at least 5,000 employees work for the company and its direct and indirect French-registered subsidiaries (defined as companies whose share capital is more than 50% owned), or at least 10,000 employees work for the company and its direct and indirect French or foreign subsidiaries. Therefore, French subsidiary companies of foreign groups may fall within the scope of the law through their own French and foreign subsidiaries, and thus be required to establish a vigilance plan for their own value chains. An exemption exists for companies controlled (Art. L. 233-3) by a company already covered.

Curiously, there is no official record of such companies. They are estimated to number around 250.[109] Perhaps influenced in turn by the European approach, a French parliamentary mission in February 2022 proposed redefining the scope of the French law by lowering the employee thresholds and introducing an alternative trigger linked to turnover.[110]

21. This number is quite low, compared to the thousands of companies, both European and non-European, potentially covered by the **proposal for a European Corporate Sustainability Due Diligence directive**.

The Directive would, firstly, be applicable to EU companies – mainly defined by their legal forms (joint-stock corporations and LLCs),[111] except for regulated financial entities –[112] that have

[107] Although the application to SASs is disputed by some, including the association of stock corporations (ANSA), in particular because Article L. 225-102-4 C. com. provides that the vigilance plan and the report on its effective implementation are included in the management report, which has no legal existence in SASs, see J.-F. Hamelin, Le devoir de vigilance en droit des sociétés in Sécuriser la sous-traitance : quels nouveaux défis ?, Toulouse : Presses de l'Université Toulouse 1 Capitole, 2019, et disponible en ligne : https://books.openedition.org/putc/7131?lang=fr; Terre solidaire, Sherpa, Le radar du devoir de vigilance. Identifier les entreprises soumises à la loi, 3rd ed. July 2021, p. 7; S. Brabant, E. Savourey, The French Law on the Duty of Vigilance: Theoretical and Practical Challenges Since its Adoption, Business and Human Rights Journal, (2021), p. 1; Rapport Ass. Nat., n° 5124, op. cit., p. p. 46. On the recent prevalence of this legal form of French companies, see A. Pietrancosta in Company Laws of the EU. A Handbook, Beck, Hart, Nomos, 2020, n° 27 *sq*.

[108] In favour of an extension, see General Council of the Economy, op. cit., p. 20; *adde*, Rapport Ass. Nat., n° 5124, op. cit., p. 45 *seq*.

[109] General Council of the Economy, op. cit., p. 33. *Adde*, Terre solidaire, Sherpa, Le radar du devoir de vigilance. Identifier les entreprises soumises à la loi, 1st ed. 2019, 2nd ed. 2020, 3rd ed. 2021.

[110] Rapport Ass. Nat., n° 5124, op. cit., p. 57.

[111] As in France and in contrast to the German Due Diligence Act.

[112] Art. 3(a) sets out a long list of legal persons or regulated entities included in the definition of company:

(i) legal persons constituted as one of the legal forms listed in Annex I to Directive 2013/34/EU of the European Parliament and of the Council (joint-stock corporations and LLCs);

(ii) legal persons constituted in accordance with the law of a third country in a form comparable to those listed in Annex I and II of that Directive;

(iii) legal persons constituted as one of the legal forms listed in Annex II to Directive 2013/34/EU composed entirely of undertakings organised in one of the legal forms falling within points (i) and (ii);

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more than 500 employees on average and a net worldwide turnover of more than EUR 150 million (group 1); or more than 250 employees and a net worldwide turnover of more than EUR 40 million, provided that at least 50% of this net turnover was generated in one or more sensitive sectors (e.g. manufacture of textiles, agriculture, fisheries, food products, extraction of mineral resources) (group 2).[113] A more technical definition of these sectors would certainly help companies to determine whether or not they are subject to the Directive.[114] Unlike the 2011 UNGPs and OECD Guidelines for Multinational Enterprises, which recommend their application to all companies, "*regardless of their size, sector, location, ownership and structure*", even if it means modulating the intensity of the corresponding obligations to take into account such factors, the European proposal follows the more restrictive French model, in particular regarding the legal forms or the size of companies, while including more legal forms and retaining much lower social thresholds (5-10 per cent of the French ones).

Conversely, moving away from the French regulatory model and closer to the 2011 UNGPs and OECD Guidelines, referring to the domicile *and* place of economic operations of multinational enterprises,[115] the Directive would also be applicable to third-country companies of a comparable legal form with a net turnover of EUR 150 million in the Union (group 1) or of EUR 40 million, provided that at least 50% of their net worldwide turnover were generated in one or more of the above-mentioned sectors (group 2). While an economic activity in Europe is not required for companies registered in the EU, for non-European companies, the choice of a criterion related to turnover generated in Europe[116] is rationalised by the fact that it ensures a sufficient territorial connection with the EU, which is necessary according to general EU law[117] and probably also to WTO law. Contrary to what some had suggested, this European turnover threshold is not doubled by a global turnover threshold, which could have been inspired by the one (750 million €) set by the new EU directive introducing public country-by-country reporting for multinational enterprises. The exclusivity of the turnover criterion reflects reasonably the difficulty of calculating the number of employees of third-country companies in the EU, although this difference of treatment with EU companies could be perceived as a form of discrimination. The emphasis on economic presence in Europe, developed outside of any European corporate structure, makes it possible to overcome all too convenient avoidance strategies on the part of non-European entities, which might otherwise seek opportunistically to opt out of the Directive's scope through use of legal forms of organisation not subject to its provisions.

In contrast to French law,[118] the wording of the proposal seems to indicate that the number of employees and net turnover thresholds[119] are to be calculated company by company,[120] and not at group level. This perhaps creates a loophole, posing a risk of manipulation of the thresholds by splitting activities among structures. The approach by legal entity contrasts with the approach

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and (iv) regulated financial undertakings, regardless of its legal forms (credit institutions, investment firms, alternative investment fund managers (AIFMs), alternative investment fund (AIFs), undertakings for collective investment in transferable securities (UCITS), insurance and reinsurance undertakings, institutions for occupational retirement provision, pension institutions, central counterparties, central securities depositories, securitisation special purpose entities, payment institutions, electronic money institutions, crowdfunding service providers, crypto-asset service providers…).

113 "*the number of part-time employees shall be calculated on a full-time equivalent basis. Temporary agency workers shall be included in the calculation of the number of employees in the same way as if they were workers employed directly for the same period of time by the company*", Art. 2(3).

114 For a detailed list, see Commission Staff Working Document, Impact Assessment Report, Annex 11.

115 See also the German and Norwegian due diligence acts, applicable to certain foreign companies operating in those countries.

116 The Country-by-Country Reporting Directive will help establish the methods for calculating net turnover for non-EU companies.

117 See CJCE, 9 Nov. 2000, *Ingmar*, aff. C‑381/98, *Rec.* p. I-9305, EU:C:2000:605, Conclusions AG Léger, ECLI:EU:C:2000:230.

118 See also the German Corporate Due Diligence in Supply Chains Act (Section 1)

119 See Art. 3(m).

120 As defined by Art. 3(a).

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adopted by the NFRD and, while the same threshold of 500 employees is retained, would consequently lead to a disconnection of the scopes of application of these two texts whose complementarity was rather sought. Similarly, the proposal does not exempt, as does French law, from the cumulative application of national laws whenever several subsidiaries located in different Member States each exceed the thresholds. It is estimated[121] that the Directive will cover about 13.000 EU companies[122] and 4.000 third-country companies.[123] Unfortunately, the impact assessment makes little effort to verify whether this estimate has been made on an individual or group basis.

As the French experience shows, however, companies, particularly SMEs, that do not fall directly under the scope of the legislation are likely to feel as a practical matter its trickle-down effect as business partners or subsidiaries of the former ones. This trickle-down effect may materialise "through contractual clauses included in B2B commercial contracts and other measures (such as joint development of action plans, investigations, change of production processes, etc.)".[124] In France, it has been estimated that "80% of French SMEs and midcaps (which are out of the French law's scope) are asked by their contractors on CSR issues, whether to sign a charter or a code of conduct, to declare themselves in conformity with the main social and environmental standards (health/safety, waste management, business ethics or human rights), to sign clauses in their contracts or to undergo an extra-financial audit".[125]

2. SUBSTANTIVE REQUIREMENTS

22. **French vigilance plans**. Any company meeting the above-mentioned criteria is required to establish, effectively implement and publish a "*vigilance plan*". The recitals of the law specify that the establishment and implementation of the vigilance plan must correspond to the concept of human rights due diligence outlined in the UNGPs.

This plan must include reasonable measures to identify risks and prevent serious harms with respect to "*human rights and fundamental freedoms, the health and safety of persons and the environment*". According to an amendment introduced by the Law n° 2021-1104 of 22 August 2021 "*on combating climate change and strengthening resilience to its effects*",[126] "*for companies producing or marketing products from agricultural or forestry operations, this plan includes, in particular, reasonable vigilance measures to identify the risks and prevent deforestation associated with the production and transport to France of imported goods and services*".

These harms may result from company, subsidiary, supplier and subcontractor activities. Here, subsidiaries are defined as companies that are under the exclusive control of the parent (Art. L 233-16 II: i.e. directly or indirectly holding a majority of voting rights; appointing for a period of two consecutive financial years the majority of the members of the administration, management or supervisory bodies, or over which it exercises a dominant influence by virtue of a contract or statutory clauses[127]). Beyond subsidiaries, the law extends to subcontractors and suppliers, but

[121] See Proposal, p. 16.

[122] In group 1: 9.400 companies; in group 2: 3.400 companies.

[123] In group 1: 2.600 companies; in group 2: 1.400 companies.

[124] Commission Staff Working Document, Impact Assessment Report, Annex 5.

[125] Devoir de vigilance : les PME en première ligne, sans être assez accompagnées par les donneurs d'ordre, Novethic, 16 Jan. 2020, https://www.novethic.fr/actualite/entreprise-responsable/isr-rse/rse-et-devoir-de-vigilance-les-pme-en-premiere-ligne-sans-avoir-toujours-les-moyens-adequats-148094.html.

[126] JORF n° 196 of 24 August 2021.

[127] Stating that "company law is lagging behind the emergence of global value chains where factual control can be exercised, similarly to corporate ownership in groups, but through contracts or financing", the European Commission underlines that French law on duty of vigilance "is innovative also for recognizing that control can be exercised through contracts", Commission Staff Working Document, Impact Assessment Report, Accompanying the document Proposal for a Directive of the European

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only those with whom an "*established business relationship*" is maintained if this relationship is related to the activities in question. There are reasons to think that such subcontractors and suppliers can either be those of the parent company or those of its subsidiaries. The concept of "established business relationship" was preferred, for reasons of effectiveness and clarity, to one initially proposed, based on the "*decisive influence*" exercised over subcontractors or suppliers' activities.[128] It refers to French competition law, where it designates all types of relations between professionals, defined as stable, regular and significant relationships,[129] with or without contracts, creating a reasonable expectation that such relation will last (Art. L. 442-1, I, 2°). This analogy, however, is perhaps strained, since the concept is used in competition law to protect a partner in the event of a sudden termination of such a relationship and not to protect third parties or the environment.[130] The most contentious issue at present is whether and to what extent this type of relationship is limited to tier 1 partners, as generally understood by companies and their representative associations, or extends beyond them to cascade partners,[131] potentially extending the vigilance duty to perhaps millions of companies.[132]

Ratione materiae, the perimeter of the plan thus seems rather vast. It includes all proven or suspected risks resulting from the activity of the company through its global supply chain. They should then be the subject of either preventive or precautionary measures.

The notion of "*risks*" subject to the Duty of Vigilance must be distinguished from those found elsewhere in the companies' annual report, with regard to the risks specific to the company itself, such as the legal, reputational or financial risks to which it is exposed. Vigilance concerns future, potential harm resulting from the activity of the company and its subsidiaries or their suppliers and subcontractors. Thus, the UNGPs' notions of "severity" and risks to rights holders could be used as a reference.[133]

Only "*serious harms*" are addressed by the law and specifically intended to be prevented. The duty of vigilance "is not an obligation of results or an unlimited requirement of means".[134] The law does not define "*serious*", although the term and concept appear commonly in French law, particularly in labour law, and French courts have a long experience in its interpretation. The Labour Code provides that in the event of serious and imminent danger to health or safety or serious risk to public health or the environment, the worker or the staff representative on the social and economic committee shall "immediately alert the employer", the sign suggesting an obligation.[135] In this matter, and in the absence of specificity in the Law, soft law provides excellent guidance. In the case of a risk, its importance will be assessed both in terms of severity of the harm and its probability.

Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, SWD(2022) 42 final, Brussels, 23.2.2022, p. 25.

[128] See S. Mac Cionnaith, G. Jazottes, S. Sabathier, Délimiter le périmètre de la vigilance : entre concepts de soft law et de hard law, RLDA 2017/124, no 6168.

[129] See Cass. com., 6 sept. 2011, n° 10-30.679 ; Cass. com., 20 mars 2012, n° 10-26.220.

[130] Rapport Ass. Nat., n° 5124, op. cit., p. 39.

[131] See G. Jazottes, Sous-traitance et « relation commerciale établie » au sens de l'article L. 442-6 du code de commerce : quelle pertinence pour le plan de vigilance ?, Revue Lamy droit des affaires, nº 139, 1er juillet 2018; Rapport Ass. Nat., n° 5124, op. cit., p. 38 and 63.

[132] According to the French Association of Private Companies (AFEP), "each of the [member] companies has several thousand direct suppliers, sometimes as many as 100,000 rank 1 suppliers [...] each of them again typically has 500 or more suppliers and subcontractors, which means that rank 2 represents between 500,000 and several million companies, which are as a practical matter impossible to monitor, something that the law recognises by only targeting established commercial relationships", in Rapport Ass. Nat., n° 5124, op. cit., p. 63.

[133] S. Brabant, E. Savourey, The French Law on the Duty of Vigilance: Theoretical and Practical Challenges Since its Adoption, Business and Human Rights Journal, (2021), p. 1, according to which "a number of companies in the first year of implementation understood the risk as a risk to their companies rather than to rights holders".

[134] General Council of the Economy, op. cit., p. 20.

[135] C. trav., art. L. 4131-1 et L. 4131-2. - C. trav., art. L. 4133-1 et L. 4133-2. - V. B. Teyssié, L'alerte en matière de santé publique et d'environnement : JCP S 2015, 1370.

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In environmental law, seriousness refers to the degree of impact on the environment, the extent of the impact and of its reversibility. The notion of "non-negligible" ecological harm, recently recognised in French law, may serve as a basis. Indeed, ecological harm means "*a significant harm on the elements or ecosystem functions or on the collective benefits obtained by man from the environment*" (Civil Code, art. 1247).[136] This definition implies that minor impacts could not be characterised as ecological harms.

As for the existence of harm to safety, health or the environment, a recurring question is the legal point of reference. In international situations, how should parent companies deal with different local legal requirements? The basic principle is that companies must comply with local law.[137] However, due diligence requires companies to take steps to address relevant harms regardless of whether they are permitted or prohibited by the laws of the countries where they take place.[138] Therefore, if local law is less prescriptive than French law, then there is typically a risk of severe harm. This risk must be identified and the company must consider whether it is possible to comply with a more prescriptive French or international standard[139] while still respecting local law. As a prominent NGO explained, "in this case, the company must respect the best standard and exert its vigilance so that its business partners comply with this standard. For example, in the case of child labour, it is quite possible to respect a higher minimum working age without infringing local law. If the answer is no, then compliance with the French or international standard must be sought. Several options are possible for companies facing conflicting standards. One obvious solution is not to operate in the country".[140] "If this is not possible, companies can set up compensation systems, use legal and judicial channels to contest the conflicting rule, practice a form of peaceful disobedience or exercise leverage with business partners and local authorities."[141] It is striking that this duty of vigilance exceeds the traditional framework of compliance, since it obliges companies to go beyond the mere requirement to comply with the applicable national laws and to apply higher standards internationally which are not even specified in the law. This deliberate ambiguity seems intended to avoid making the duty of vigilance a purely procedural obligation that would over time drift into merely a "box-ticking" exercise.[142]

Another restriction comes from a requirement of "reasonableness" of the measures contained in the plan, a standard that appears potentially to modulate the standard of vigilance. It incorporates both an idea of rationality and fairness. Reasonableness depends on the proportionality of the measures taken in relation to the risks. Once again, the duty of vigilance is not cast as an unlimited requirement to prevent all harm. This implies in particular that the level of technical, human and financial resources should be invested according to the seriousness of each risk. In the absence of a decree or other practical authoritative guidance, one can expect that

[136] Art. 1247 (créé par la loi n° 2016-1087 du 8 août 2016 - art. 4) : « *Est réparable, dans les conditions prévues au présent titre, le préjudice écologique consistant en une atteinte non négligeable aux éléments ou aux fonctions des écosystèmes ou aux bénéfices collectifs tirés par l'homme de l'environnement* ».

[137] See the UN Guiding Principle 23; 2018 OECD Due Diligence Guidance for Responsible Business Conduct; General Council of the Economy, op. cit., p. 42. Comp. ISO 26000, Guidance on social responsibility, 4.6 *sq.*

[138] Study on due diligence requirements through the supply chain, EC, January 2020, p. 266.

[139] On the list of international human rights standards, see Study on due diligence requirements through the supply chain, EC, January 2020, p. 222.

[140] Cf. the UNGPs FAQs, Q.31; The Corporate Responsibility To Respect Human Rights, An Interpretive Guide, UN 2012, p. 78; see e.g. the Unilever decision to divest its tea operations in Kenya, even though the company won in 2018 the case brought by the survivors of 2007 post-election attacks at a local tea plantation.

[141] Sherpa, Vigilance Plans Reference Guidance, 1st edition, p. 39.

[142] See Rapport Ass. Nat., n° 5124, op. cit., p. 38.

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the determination of the right level of precautions necessary to achieve the objective of "effective implementation" of the plan will itself create a risk of fuelling litigation.[143]

23. **Minimum content**. The French vigilance plans must include at least five elements:

- a mapping that identifies, analyses and ranks risks;
- an assessment procedure for subsidiaries, subcontractors or suppliers with whom they have an established business relationship;
- appropriate actions to mitigate or prevent serious risks;
- a whistleblowing mechanism to issue alerts and obtain reports concerning such risks;
- and - a system to monitor and evaluate the efficacy of these measures.

As we can see the French duty of vigilance is more than a simple duty of care i.e. a duty to do no harm, but includes a procedural requirement to take proactive and demonstrable steps. And it is not just a duty to prevent harm, which would only be breached if the company fails to prevent the harm.

As indicated by the Constitutional Council, the law does not require companies subject to the duty of vigilance to disclose publicly information relating to their industrial or commercial strategy, which makes it possible to consider that its provisions do not constitute a disproportionate infringement of the freedom of enterprise.

24. **Elaboration of the plan**. French law only provides that "*The plan should be elaborated in cooperation with the company's stakeholders, and where appropriate, as part of multiparty initiatives that exist in the subsidiaries or at a territorial level*". The law does not define these stakeholders[144], nor does it specify how they should be associated. The law is not mandatory on this subject. In practice, about a third of companies have reported in 2019 having discussed their vigilance plan with their stakeholders. While consultation with trade unions is fairly widespread, effective and more common than in the rest of the world, discussions with NGOs are often heated.

On the contrary, it specifies that the whistleblowing mechanism must be "*drawn up in consultation with the representative trade union organisations within the company*". "This choice by the legislator can be explained by the fact that, as demonstrated above, the alert is a tool known to workers and their representative organisations because of their pre-existing right to alert and withdraw in the event of a serious and imminent danger to health or safety."

A governmental decree may supplement the vigilance measures provided in the law. It may also specify the procedures for drawing up and implementing the vigilance plan, where applicable within the framework of multi-party initiatives within sectors or at the territorial level.

Deploring the inadequate involvement of stakeholders in the elaboration of the plans, a parliamentary report dated 24 February 2022 proposed making stakeholder involvement compulsory, leaving to regulatory authority the terms and conditions of their involvement, for example by setting up a stakeholder committee, based on the model of the mission committee provided for under the PACTE law for mission companies.[145]

25. **Public disclosure**. The vigilance plans, as well as the reports on their implementation, are public and included in the company's annual report. This publication started in 2018, with the report covering 2017. A summary describing the implementation of the plan must also be published annually.

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[143] S. Brabant, E. Savourey, The French Law on the Duty of Vigilance: Theoretical and Practical Challenges Since its Adoption, Business and Human Rights Journal, (2021), p. 1, according to which "a number of companies in the first year of implementation understood the risk as a risk to their companies rather than to rights holders".

[144] See article 4 of law No. 2012-1559 of 31 December 2012 on the creation of the Public Investment Bank.

[145] Rapport Ass. Nat., n° 5124, op. cit., p. 45.

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26. **European CS3D**. While, as indicated, the proposed Directive follows the path opened by the French legal regime, its teleological and procedural nature, it is in many respects more elaborate, extensive and ambitious, taking direct inspiration in the UNGPs,[146] the 2011 OECD Guidelines for Multinational Enterprises and the 2018 OECD Due Diligence Guidance for Responsible Business Conduct. In general terms, the contemplated Directive would principally require Member States to ensure that the covered companies "*conduct human rights and environmental due diligence*", which includes the following actions (Article 4):

1) Integrating due diligence into all of a company's policies and establishment of a "*due diligence policy*", updated annually, containing "*a description of the company's approach, including in the long term, to due diligence; a code of conduct describing rules and principles to be followed by the company's employees and subsidiaries; a description of the processes put in place to implement due diligence, including the measures taken to verify compliance with the code of conduct and to extend its application to established business relationships*." (Article 5).

2) Identifying actual or potential adverse impacts: companies would have to "*take appropriate measures to identify actual and potential adverse human rights impacts and adverse environmental impacts arising from their own operations or those of their subsidiaries and, where related to their value chains, from their established business relationships*" (Article 6).[147]

By way of derogation, EU and non-EU group 2 companies would only have to identify actual and potential "*severe adverse impacts*" relevant to the respective sector, i.e. impacts that are "*especially significant by [their] nature, or affects a large number of persons or a large area of the environment, or which [are] irreversible, or [are] particularly difficult to remedy as a result of the measures necessary to restore the situation prevailing prior to the impact*" (Article "(l)).

3) Preventing and mitigating "*potential adverse impacts*" (Article 7): companies would need to "*take appropriate measures to prevent, or where prevention is not possible or not immediately possible, adequately mitigate potential adverse human rights impacts and adverse environmental impacts that have been, or should have been, identified*".

The relevant measures can take various forms. Companies would thus be required: "*where necessary due to the nature or complexity of the measures required for prevention*", to "*develop and implement a prevention action plan*", "*developed in consultation with affected stakeholders*", "*with reasonable and clearly defined timelines for action and qualitative and quantitative indicators for measuring improvement*"; to "*seek contractual assurances from a business partner with whom it has a direct business relationship that it will ensure compliance with the company's code of conduct and, as necessary, a prevention action plan, including by seeking corresponding contractual assurances from its partners, to the extent that their activities are part of the company's value chain (contractual cascading)*"; to "*make necessary investments, such as into management or production processes and infrastructures*"; to "*provide targeted and proportionate support for an SME with which the company has an established business relationship, where compliance with the code of conduct or the prevention action plan would jeopardise the viability of the SME*"; or to "*collaborate with other entities, including, where relevant, to increase the company's ability to bring the adverse impact to an end, in particular where no other action is suitable or effective*".

When potential adverse impacts cannot be prevented or adequately mitigated by the above-mentioned measures, companies "*may seek to conclude a contract with a partner with whom it has an indirect relationship, with a view to achieving compliance with the company's code of conduct or a prevention action plan*". Such contracts or contractual assurances are to be "*accompanied by the appropriate measures to verify compliance*". When the counterparty is an

[146] See the UN Guiding Principles 16 *seq*.

[147] For "*regulated financial undertakings*" providing "*credit, loan or other financial services*", "*identification of actual and potential adverse human rights impacts and adverse environmental impacts shall be carried out only before providing that service*".

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SME, the terms would have to be "*fair, reasonable and non-discriminatory*", and some related costs (independent third-party verification) borne by the companies.

Ultimately, where all of these measures might not be sufficient, the companies would "*be required to refrain from entering into new or extending existing relations with the partner in connection with or in the value chain of which the impact has arisen*" and, "*where the law governing their relations so entitles them to*", "*temporarily suspend commercial relations with the partner in question, while pursuing prevention and minimisation efforts*", "*if there is reasonable expectation that these efforts will succeed in the short-term*", or "*terminate the business relationship with respect to the activities concerned if the potential adverse impact is severe*",[148] being added that Member States have to provide for such an option to terminate the business relationship in contracts governed by their laws.

4) Ending and minimising the extent of "*actual adverse impacts*" (Article 8): companies would have to "*take appropriate measures*" "*to bring actual adverse impacts that have been, or should have been, identified […] to an end*", or if not possible, to "*minimise the extent of such an impact*". These measures include "*the payment of damages to the affected persons and of financial compensation to the affected communities*"; the development and implementation of a "*corrective action plan*", possibly in consultation with stakeholders; "*contractual assurances*" from direct or indirect partners with whom the companies have established business relationships; "*necessary investments, such as into management or production processes and infrastructures*"; the provision of "*targeted and proportionate support for an SME with which the company has an established business relationship, where compliance with the code of conduct or the corrective action plan would jeopardise the viability of the SME*"; and collaboration with other entities.

As provided for potential adverse impacts, when actual adverse impacts cannot be brought to an end or adequately mitigated through the above-mentioned measures, companies "*may seek to conclude a contract with a partner with whom it has an indirect relationship, with a view to achieving compliance with the company's code of conduct or a corrective action plan.*" One can anticipate the difficulties of practical and legal implementation of this provision, which presupposes the identification of numerous indirect partners and their freedom to conclude this type of contracts. It seems, however, to be construed as an optional way to achieve compliance. Such contracts and contractual assurances are also to be "*accompanied by the appropriate measures to verify compliance*"; when the counterparty is an SME, the terms used would have to be "*fair, reasonable and non-discriminatory*", and some related costs (independent third-party verification) borne by the companies.

Comparable non-extension, suspension or termination measures would have to be taken as regards actual adverse impacts that could not be brought to an end or the extent of which could not be minimised by the above-listed measures.

5) Establishing and maintaining a "*complaints procedure*" (Article 9): companies would be required to provide the possibility for persons affected – actually or potentially – by an adverse impact and listed organisations – "*trade unions and other workers' representatives representing individuals working in the value chain concerned*", "*civil society organisations active in the areas related to the value chain concerned*" – to "*submit complaints to them where they have legitimate concerns regarding actual or potential adverse human rights impacts and adverse environmental impacts with respect to their own operations, the operations of their subsidiaries and their value chains*". Complainants would be entitled "*to request appropriate follow-up on the complaint*" and to meet with the companies' representatives at an appropriate level. Unfortunately, nothing is said about the relationship of this obligation to various other obligations in other European whistleblower laws. One might also have expected the introduction of additional conditions

[148] For "*regulated financial undertakings*" providing "*credit, loan or other financial services*", the requirement to terminate the credit, loan or other financial service contract would not apply "*when this can be reasonably expected to cause substantial prejudice to the entity to whom that service is being provided*".

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regarding civil-society organisations' complaints. Finally, there is no specific reference to public sector entities.

6) Monitoring "*the effectiveness of their due diligence policy and measures*" (Article 10): companies would have to conduct "*periodic assessments of their own operations and measures, those of their subsidiaries and, where related to the value chains of the company, those of their established business relationships, to monitor the effectiveness of the identification, prevention, mitigation, bringing to an end and minimisation of the extent of human rights and environmental adverse impacts*". Such assessments would "*be based, where appropriate, on qualitative and quantitative indicators and be carried out at least every 12 months and whenever there are reasonable grounds to believe that significant new risks of the occurrence of those adverse impacts may arise*". This annual obligation, which may apply to thousands or even tens of thousands of companies, seems particularly onerous. A proportionality requirement should perhaps lead to a prioritisation between the frequency and scope of the periodic assessments, in order to reach reasonable compromises.

7) Public reporting (Article 11): companies that are not subject to reporting requirements under the NFRD/CSRD[149] would report on due diligence matters, "*by publishing on their website an annual statement in a language customary in the sphere of international business*".

For EU companies, national laws would ensure that directors are "*responsible for putting in place and overseeing the due diligence actions referred to in Article 4 and in particular the due diligence policy referred to in Article 5, with due consideration for relevant input from stakeholders and civil society organisations*"; they are expected *to* "*report to the board of directors in that respect*" (Article 26(1)). Even if little precise information on the allocation of powers among "directors" emerges, given the broad definition of the concept, the requirement underscores the well-established critical importance of major CSR decisions being taken "out of the hands of lower-level functionaries".[150] Article 26 is awkwardly drafted, however, as it refers to "*directors*", instead of designating the board of directors (*lato sensu*), as the body responsible for designing and overseeing the due diligence policy. Without mentioning any restriction related to the nationality of the companies, its second paragraph adds that Member States would ensure that "*directors take steps to adapt the corporate strategy to take into account the actual and potential adverse impacts identified pursuant to Article 6 and any measures taken pursuant to Articles 7 to 9*". This would constitute an independent and substantive obligation for the directors, in addition to their general duty of care referred to in Article 25, to adapt the company's own strategy, particularly, one imagines, when the other policies (including due diligence) appear insufficient to the directors to mitigate adverse effects of the company's activities on human rights and the environment.

27. Compared to the French system, the European proposal is much more specific and elaborate. It clearly attempts to respond to the criticisms levelled at it and at the European Parliament resolution of March 2021. Although it is far from certain that it will be sufficient to satisfy fully the need for the legal certainty strongly demanded by companies, the attempt to do so is obviously welcome.

It firstly manifests itself through the definition of key concepts, absent from the French duty of vigilance. The proposal thus tries to minimise the use of imprecise and open-ended standards[151] and, following the German model rather than the French one, to describe specifically those with which companies must comply.

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[149] Recall that the NFRD, as well as the current CSRD proposal, are only applicable to EU entities, v. *supra* n° 4.

[150] C.D. Stone, Where the Law Ends, op. cit. p. 217.

[151] See ECLE, The European Parliament's draft directive on corporate due diligence and corporate accountability, Rivista Delle Società, Anno LXVI Fasc. 2-3 – 2021 and RTDF 2022/1.

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Thus, the notion of "*adverse environmental impact*" is defined by reference to the violation of one of – 12 – prohibitions and obligations pursuant to specific international environmental conventions listed in the Annex (Part II) (e.g., use of certain biological resources, chemicals, manufacture of mercury-added products, import or export of hazardous wastes, production and consumption of specific substances that deplete the ozone layer).[152] The Paris Agreement is not included in the list at this stage,[153] which may explain the existence of a separate article on climate change.[154]

Similarly, an "*adverse human rights impact*" results from the violation of one of – 21 – specific rights or prohibitions listed in the Annex (Part I).[155] This Annex (Part I) is divided into two sections. The first section (Points 1 to 20) refers to certain human rights which are assumed to be particularly susceptible to violation by companies (e.g., the right to not be deprived of means of subsistence, the right to life and security, the prohibition of torture, cruel, inhuman or degrading treatment, the right to liberty and security, the right to privacy, the freedom of thought, the right to enjoy just and favourable conditions of work, the right of the child, the prohibition of forced labour and slavery, the freedom of association)[156]. Point 21 contains a "catch-all clause" of other violations of a prohibition or right included in the general list of human rights agreements set out in Section 2, provided that such violation "*directly impairs a legal interest protected in those agreements*" and "*that the company concerned could have reasonably established the risk of such impairment and any appropriate measures to be taken in order to comply with the obligations referred to in Article 4 of this Directive taking into account all relevant circumstances of their operations, such as the sector and operational context*". The European Convention on human rights or the EU Charter of Fundamental Rights are not part of this general list. Where there is a conflict with other EU legislation, however, the Directive requires companies to apply the obligations that offer the highest level of protection regarding human rights, environmental or climate change.[157] Case law interpreting these provisions would presumably be incorporated by reference. Although efforts have obviously been made, compared to the proposals from the European Parliament, it is regrettable that some of these standards continue to relate more to the responsibilities of States, particularly with regard to their political organisation, than to those of companies. Such nationalisation and privatisation of international public law provisions certainly raise legal issues stemming from the differences in nature and consequences between these categories of norms. This transmutation would even appear paroxysmal if a situation were to arise in which a Member State attempted to impose on companies governed by its law obligations which it had itself failed to ratify (a situation difficult to rule out a priori, as there is no indication of the state of ratification by the Member States of all the treaties listed). States' failure to perform their obligations under these international conventions would not *per se* exempt companies from their own responsibility.[158]

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[152] Art. 3(b).

[153] According to the review provisions of the proposal (Art. 29), the future implementation report of the Commission to the European Parliament and to the Council will have to assess "*whether Articles 4 to 14 should be extended to adverse climate impacts*."

[154] See Art. 15 above.

[155] Art. 3(c).

[156] Point 18, referring to "the prohibition of causing any measurable environmental degradation, such as harmful soil change, water or air pollution, harmful emissions or excessive water consumption or other impact on natural resources", demonstrates the interplay between human rights and environmental protection. As we know, on 8 October 2021, the United Nations Human Rights Council adopted Resolution 48/13 recognising that "the enjoyment of the right to a clean, healthy and sustainable environment is an important element in the enjoyment of human rights".

[157] Art. 1(3).

[158] According to the UNGPs FAQs, the companies' responsibility to respect human rights "exists independently of whether States fulfil their obligations."

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Such impact is "*severe*" if it: is especially significant by its nature, affects a large number of people or a large area of the environment, or is irreversible and particularly difficult to remedy.[159]

A "*value chain*" would be understood as encompassing "*activities related to the production of goods or the provision of services by a company, including the development of the product or the service and the use and disposal of the product as well as the related activities of upstream and downstream established business relationships of the company*".[160] If B-to-B relationships are surely covered, the reference made to the "use" of the product creates an uncertainty as to the inclusion of end-clients in the value chain,[161] particularly when they are not ordinary consumers, but powerful entities. In any case, this value chain has no territorial borders: the CS3D thus differs from ordinary international human rights conventions in requiring States to regulate the extraterritorial activities of companies domiciled in their territory and/or jurisdiction.[162] These standards of behaviour thus seem to operate as a jurisdictional trigger on EU companies, an element of their personal status, making the regime applicable to them on a global basis. As in France, it seems that subsidiaries are covered even if they are not part of the value chain of their parent company because they do not contribute to the production of the goods and supply of services of the parent company; and that a parent company not otherwise subject to the proposal is only included if it is part of its subsidiary's value chain. In other words, if the value chain goes upstream and downstream, the chain of legally responsible companies only goes downstream. Unlike French law, which uses an impersonal wording, the European reference to the value chain of "*the company*"[163] may cast doubt on whether that of its subsidiaries is intended to be included.[164] Generally speaking, not applying value chain liability on an integrated parent-subsidiary group basis, but rather on an individual company-by-company basis is likely to complicate unnecessarily the implementation and enforcement of covered diligence or climate transition measures. This is particularly problematic when only subsidiaries, but not their parent companies, cross the applicable thresholds. The only provision referring to the group in this respect is one allowing companies, "*for the purposes of due diligence*", "*to share resources and information within their respective groups of companies and with other legal entities in compliance with applicable competition law*".[165] One way forward could be to recognise the option for parent companies with only subsidiaries crossing the thresholds to put in place consolidated due diligence measures.

Directly imported from French law, the Directive proposal introduces the "novel and untested concept"[166] of an "*established business relationship*". A "*business relationship*" refers to "*a relationship with a contractor, subcontractor or any other legal entities ('partner') (i) with whom the company has a commercial agreement or to whom the company provides financing, insurance or reinsurance, or (ii) that performs business operations related to the products or services of the company for or on behalf of the company*".[167] To qualify as an "*established*" one, such a

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[159] Art. 3(l). Comp. the commentary of the UNGPs § 14: "Severity of impacts will be judged by their scale, scope and irremediable character"; *adde*, The Corporate Responsibility To Respect Human Rights, An Interpretive Guide, UN 2012, p. 5.

[160] Art. 3(g). Regarding regulated financial undertakings, "*value chain*" with respect to the provision of these specific services would "*only include the activities of the clients receiving such loan, credit, and other financial services and of other companies belonging to the same group whose activities are linked to the contract in question. The value chain of such regulated financial undertakings does not cover SMEs receiving loan, credit, financing, insurance or reinsurance of such entities.*"

[161] In the German Due Diligence Act, the supply chain "*refers to all products and services of an enterprise. It includes all steps in Germany and abroad that are necessary to produce the products and provide the services, starting from the extraction of the raw materials to the delivery to the end customer*" (Section 2(5)).

[162] See the UN Guiding Principle 2.

[163] Proposal, Art. 1(1).

[164] This kind of ambiguity reflects the difficulties of the transition from soft law to hard law. Revealingly, the 2011 UNGPs does not contain any reference to "subsidiaries" and only reasoned in terms of "business enterprises".

[165] Art. 4(2).

[166] The EU Commission's Proposal for a Corporate Sustainability Due Diligence Directive. Shift's Analysis, March 2022.

[167] Art. 3(e). Comp. UNGPs § 13.

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relationship, whether direct or indirect, is "*expected to be lasting, in view of its intensity or duration and […] does not represent a negligible or merely ancillary part of the value chain*".[168]

The notion of "*indirect*" business relationship, on the other hand, is not defined. Its inclusion in the European text certainly entails the risk of a considerable extension of the scope of the duty of diligence and is currently the focus of criticism from business organisations. This inclusion of indirect business relationships will certainly disappoint those in France in particular, who were hoping that the European Directive would clarify and reduce the scope of the French duty of vigilance to companies belonging to the same group. It would only increase the operational risks on companies, as would other measures such as the application of a company's code of conduct to outside business partners, and the occurrences of conflicts of laws or standards applicable to third parties that may belong to several value chains. True, the CS3D takes inspiration from international standards and German law. While the former, in particular the 2011 UNGPs and OECD Guidelines for Multinational Enterprises, focus on preventing or mitigating "*impacts that are directly linked*" to a company's operations, products or services[169], the expression, as the Interpretative Guide shows, only seeks to characterise an objective linkage between the harm and the company's products, services and operations through other entities that could be beyond the first tier in its supply chain.[170] The German Due Diligence Act also targets indirect suppliers, as enterprises "*whose supplies are necessary for the production of the enterprise's product or for the provision and use of the relevant service*."[171] In both cases, however, if the due diligence obligations are not conditioned upon the existence of a direct business relationship,[172] the inclusion is more clearly balanced by a risk-based approach and a risk-prioritisation focus[173]. In Germany, for instance, a company may only take immediate diligence measures if it "*has actual indications that suggest that a violation of a human rights-related or an environment-related obligation at indirect suppliers may be possible (substantiated knowledge)*".[174]

Secondly, the clarification effort is expressed at the operational level by the care taken to lay down more precisely than French law does the obligations to prevent, mitigate or remediate risks or damages linked to potential or actual adverse impacts. Due diligence procedures are described step by step, almost like a *crescendo*, and formalised in companies' policies, some of which – prevention action plan; corrective action plan – would be developed "*in consultation with stakeholders*".[175]

These procedures are based on appropriate measures[176] whose effectiveness would be proportionate to the harm done or likely to be done to the human and environmental interests the

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[168] Art. 3(f).

[169] UNGPs, § 13.

[170] See the UNGPs FAQs, Q.32. *Adde*, The Corporate Responsibility To Respect Human Rights, An Interpretive Guide, UN 2012, p. 5.

[171] Section 2 § 8.

[172] See the EU Commission Impact Assessment report, op. cit., p. 40: "Options limiting the due diligence obligation to the company's direct suppliers have also been discarded due to lack of effectiveness and inconsistency with the international voluntary framework".

[173] See the UN Guiding Principle 17 commentary: "*Where business enterprises have large numbers of entities in their value chains it may be unreasonably difficult to conduct due diligence for adverse human rights impacts across them all. If so, business enterprises should identify general areas where the risk of adverse human rights impacts is most significant, whether due to certain suppliers' or clients' operating context, the particular operations, products or services involved, or other relevant considerations, and prioritize these for human rights due diligence*"; *adde*, Guiding Principle 24; The Corporate Responsibility To Respect Human Rights, An Interpretive Guide, UN 2012, p. 41 *seq*, p. 82 *seq*. On the criticism of this deviation of the proposal from international standards, see The EU Commission's Proposal for a Corporate Sustainability Due Diligence Directive. Shift's Analysis, March 2022; A. Lafarre, Mandatory Corporate Sustainability Due Diligence in Europe The Way Forward, OBLB, 21 April 2022.

[174] Section 9 § 3.

[175] Art. 7(2)(a) and 8(3)(b).

[176] I.e., measures "*capable of achieving the objectives of due diligence, commensurate with the degree of severity and the likelihood of the adverse impact, and reasonably available to the company, taking into account the circumstances of the specific*

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law seeks to protect. In so doing, modulations and derogations are introduced. Some involve taking into account national laws – relating to contracts or competition – which may constrain the nature or effectiveness of the measures that can be implemented.[177] Others limit the civil liability of a company for damages caused by an adverse impact arising as a result of the activities of an indirect partner with whom it has an established business relationship to cases where "*it was unreasonable, in the circumstances of the case, to expect that the action actually taken, including as regards verifying compliance, would be adequate to prevent, mitigate, bring to an end or minimise the extent of the adverse impact*".[178] Others still are reflected in the exemption from the obligation to terminate credit or financial services contracts "*when this can be reasonably expected to cause substantial prejudice to the entity to whom that service is being provided*",[179] a standard that is likely to prove difficult in practice to interpret and enforce. On the other hand, with regard to the termination of ordinary contracts, the proposal does not take up the idea of the 2011 OECD Guidelines that a company "*should also take into account potential social and economic adverse impacts related to the decision to disengage.*"[180] Others finally are reflected and realised in the relaxations set out for SMEs. Thus, group 2 companies would have four years instead of two years for group 1 companies to comply with the CS3D.[181] They would, by way of derogation, only be required to implement a due diligence policy for actual and potential "*severe adverse impacts*" relevant to their respective sectors.[182] For SMEs included in a covered value chain, it is provided for either "*targeted and proportionate support*" from companies with which they have an established business relationship, "*where compliance with the code of conduct or the prevention action plan would jeopardise their viability*";[183] or for direct payment of costs related to the external verification of measures to assure compliance carried out in relation to them.[184] Regrettably, possible abuses by the States in which the critical activities take place are not explicitly listed among exemptions or limitations, although their role can be decisive in many situations.[185] Recent experience has shown that, faced with such situations, some European companies have chosen to cease operations entirely in certain countries, potentially making way for competitors with less stringent human rights or environmental standards.[186] This "forced departure" from a country, even as a solution of last resort, should not be considered lightly, as it may in certain cases be against the interests of the countries and populations affected. Here too, the Commission might be well advised to draw from the OECD and UN guidelines, which generally take into account potential social and economic adverse effects of a company's decision to disengage.

In the same vein, the proposal seeks to clarify some of the new obligations by way of delegated acts, currently limited to public reporting,[187] of voluntary "*model contractual clauses*" developed

case, including characteristics of the economic sector and of the specific business relationship and the company's influence thereof, and the need to ensure prioritisation of action" (Art. 3(q)).

[177] See Art. 7(2)(e), 7(5), 8(3)(f) and 8(6).

[178] Art. 22(2).

[179] Art. 7(6) and 8(7).

[180] 2011 OECD Guidelines, § 22. *Adde*, The Corporate Responsibility To Respect Human Rights, An Interpretive Guide, UN 2012, p. 79.

[181] Art. 30.

[182] Art. 6(2).

[183] Art. 7(2)(d) and 8(3)(e).

[184] Art. 7(4) and 8(5).

[185] In the event of failures of political organisations and abuses committed by host States, as unfortunately all too often witnessed, little efforts have been made to elaborate on the acceptable lines of conduct for companies, see Paul Davies, Ending Human Rights Abuses in which Companies and States are Complicit, Oxford Business Law Blog, 5 Apr 2022.

[186] See e.g. John Armour, Luca Enriques, Thom Wetzer, Dark and Dirty Assets: Greening Climate-Driven Asset Partitioning, Oxford Business Law Blog, 14 Jun 2022 (https://www.law.ox.ac.uk/business-law-blog/blog/2022/06/dark-and-dirty-assets-greening-climate-driven-asset-partitioning).

[187] Art. 11.

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by the Commission to facilitate compliance with the obligation for companies to seek contractual assurances from a business partner with whom they have a direct business relationship,[188] or more broadly by way of guidelines "*to provide support to companies or to Member State authorities on how companies should fulfil their due diligence obligations*", "*including for specific sectors or specific adverse impacts*".[189] If such guidelines, drafted by the Commission "*in consultation with Member States and stakeholders, the European Union Agency for Fundamental Rights, the European Environment Agency, and where appropriate with international bodies having expertise in due diligence*", may be helpful in terms of clarity and harmonisation, their effectiveness and efficacy remain limited because of their non-binding nature for recipient companies and third parties, since compliance with the guidelines does not constitute a safe harbour.[190] It is also rather surprising, given the breadth of such a result-based obligation and the complexity of climate risk measurement,[191] that these guidelines do not expressly cover the requirement for companies to adopt a plan ensuring that the business model and strategy of the company are compatible with the transition to a sustainable economy and limiting of global warming to 1.5°C, in line with the Paris Agreement. If the latest climate science indicates that limiting global warming to 1.5°C means reducing the world's emissions to reach net zero by 2050 or sooner, the difficulty remains for a company to determine with sufficient precision its own reduction effort to comply with this global limit, in light of the lack of consensus on the subject and the fact that some sectors will have to decarbonise faster than others.[192] The wording of Article 15 is ambiguous in this respect, as it states that the obligation to include in its plan "*emission reduction objectives*" only applies "*in case climate change is or should have been identified as a principal risk for, or a principal impact of, the company's operations*". The relevance of the reference to the double materiality, which leads to imposing emission reduction targets on a company with no significant climate impact, may also be challenged, under the apparent company-by-company approach. Here, the proposal falls short of market expectations in terms of standardisation and harmonisation.[193] Similarly, collaborative behaviour among independent companies and sharing of information or resources within groups for the purposes of the Directive should be explicitly protected under competition law.

Accompanying measures are also possible on the part of Member States who, in order to provide information and support to companies and the partners with whom they have established business relationships in their value chains in their efforts to fulfil the due diligence obligations, could "*set up and operate individually or jointly dedicated websites, platforms or portals*".[194] These measures may even include public financial support for SMEs, without prejudice to applicable State aid rules. The Commission may "*complement Member States' support measures building on existing Union action to support due diligence in the Union and in third countries*

[188] Art. 12.

[189] Art. 13.

[190] See ECLE, The European Parliament's draft directive on corporate due diligence and corporate accountability, Rivista Delle Società, Anno LXVI Fasc. 2-3 – 2021 and RTDF 2022/1.

[191] See Basel Committee on Banking Supervision, Climate-Related Financial Risks—Measurement Methodologies (April 2021).

[192] According to the impact assessment (Annex 13), some companies "should adopt and implement, as part of their corporate strategy, a science-based target for climate change mitigation. A science-based target would be defined as follows: (1) one which is in line with the maximum of 1.5 degrees global warming objective compared to pre-industrial levels based on the latest scientific knowledge (2) which covers all greenhouse gases (3) which includes short-term, medium and long-term targets quantifiable in absolute reduction levels compared to the base year, (4) which, if relevant, takes into account applicable national targets and other law (6) the use of carbon capture and storage processes to compensate for emissions would be allowed." On the difficulty for investors to assess the effectiveness of a plan and the current benchmarks, see PRI, Climate transition plan votes, Feb. 2022.

[193] See W.-G. Ringe, A.A. Gözlügöl, Private Companies: The Missing Link on The Path to Net Zero, Working Paper N° 635/2022, March 2022; W.-G. Ringe, Net-Zero Plans under the Proposed CSDD, OBLB, 28 April 2022.

[194] Art. 14.

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and may devise new measures, including facilitation of joint stakeholder initiatives to help companies fulfil their obligations."

While this search for certainty and precision is understandable, there is a risk of an opposite pitfall in piling on more and more meticulous obligations, leading to formidable counterproductive effects, such as diluting the objectives pursued in an inflated self-absorbed regulation which promotes mechanical efforts at compliance rather than responsible judgment.[195]

28. On one major point, however, the proposal raises delicate problems that do not exist in French law, as a result of its application to certain non-EU companies. A clear distinction must indeed be made between the personal scope of the Directive and the territorial scope of the measures that the companies covered are required to take. While the former is by nature European, the latter is by nature global. As indicated in its impact assessment, the comparative advantage of the CS3D proposal on traditional EU environmental law lies in its application "to the value chains outside the EU where up to 80-90% of the environmental harm may occur".[196] While, in presence of a European legal entity, even if it is a subsidiary of a non-EU company, the applicable measures would logically relate to its own global value chain, the direct imputation of European diligence duties to a non-EU legal entity would extend their application throughout its whole global value chain without a similar geographic limitation. In addition to the possible contradictions in applicable laws and standards that would result, the legality of such an extraterritorial application of EU law is likely to be questioned by third countries. Particularly problematic would be the claim that European law regulates conducts attributable to non-European companies located outside the European Union and without direct, substantial and foreseeable effects on its territory. Restricting the application of these diligence duties to the European activities of third-country companies would, however, be criticised as excessively limiting the Directive's human rights and environmental protection's effectiveness and might sometimes be inconsistent with the very purpose of these duties, such as those requiring a climate transition plan towards a global warming objective. On the other hand, extending such application worldwide would inevitably create international tension and conflicts. It would in particular raise the delicate question of the compatibility of such measures with ordinary WTO rules. As we know, these rules exceptionally take into account the protection and promotion of societal values and interests,[197] although to an extent and under conditions that are still difficult to determine with certainty.[198] One of the criteria for assessing the legality and acceptability of such European provisions to third-country companies by virtue of their economic presence in the internal market, might be related to the policy effects of achievement of objectives promoted under international law. The latter indeed recognises specifically, on the basis of the UN Guiding Principles on Business and Human Rights, that "*international law accepts corporate social responsibility as a standard of crucial importance for companies operating in the field of international commerce. This standard includes commitments to comply with human rights in the framework of those entities' operations conducted in countries other than the country of their seat or incorporation*".[199] In our case, a large number of the texts cited in the annexe to the European

[195] See on this debate, T. Sachs et C. Clerc, Le devoir de vigilance à la croisée des chemins ?, Revue de Droit du Travail, juin 2022, p. 352.

[196] Commission Staff Working Document, Impact Assessment Report, op. cit., p. 2.

[197] See Article XX of the GATT 1994.

[198] See P. Van den Bossche, W. Zdouc, The Law and Policy of the World Trade Organization: Text, Cases and Materials, Cambridge University Press, 4th ed., 2017, Part 8.

[199] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, 8 Dec. 2016, § 1195. *Adde*, for the home States' obligation to mandate the respect of human rights, D. Augenstein, D. Kinley, *When human rights "responsibilities" become "duties": the extraterritorial obligations of states that bind corporations, in* S. Deva and D. Bilchitz (eds.), *Human Rights Obligations of Business : Beyond the corporate responsibility to respect?*, 2013, Cambridge University Press; O. De Schutter, *Towards a New Treaty on Business and Human Rights*, 2016, Business and Human Rights Journal, p. 41; C. M. O'Brien, *The Home State Duty to Regulate the Human Rights Impacts of TNCs*

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proposal, related to human rights and environmental protection, to the effectiveness of which due diligence measures contribute, correspond to international standards. The connection is even more unequivocal with regard to the climate transition plans imposed on companies, the exclusive reference to an international treaty – the Paris Agreement – being made in the body of the text. In accordance with a correlation that seems to be logically accepted in WTO law, the weaker the territorial connection with the regulating countries, the higher the level of international recognition and support for the societal and environmental norms invoked to justify imposing measures resulting in trade restrictions should be.[200] Between two radical interpretations, an acceptable compromise could be found in the worldwide application of the European provisions to a non-EU company operating economically in Europe, but limited to activities involving products or services offered in the EU. This particular limitation would of course further undermine the contemplated level-playing field with European companies. If this were the Commission's intention, it should be made explicit in the text.

3. ENFORCEMENT AND SANCTIONS

29. **French duty of vigilance**. **Preemptive claims**. Regarding sanctions, two different wrongdoings should be distinguished under French law. The first is failure to establish, publish and maintain a plan in accordance with the law. Since the French duty of vigilance is framed as duty to conduct due diligence with respect to actual or potential harms, it is possible to bring a pre-emptive claim on the basis that the company is failing to meet the standard of due diligence required for actual or potential harms. In such a case, the company may be given formal notice to comply with its obligations. The proceedings may stop at this stage, in particular if the company concerned agrees to adopt the measures requested. Sometimes the formal notices are made public, which increases the pressure on the companies involved. If a company fails to comply with its obligations within a period of three months following the formal notice, the competent court may, at the request of any person proving an interest in acting, enjoin it to do so, where necessary under penalty. As noted above, the legislation originally included civil penalty provisions for companies that do not establish or implement a plan, but these were struck down by the Constitutional Council.

As far as we know, ten letters of formal notice have already been issued and made public:[201]

- two at Total: one for its responsibility to combat climate change (18 June 2019), initiated by French NGOs (Sherpa, Notre Affaire à Tous), Ecomaires as well as 14 local authorities[202]; and the second for the activities of a subsidiary in Uganda (25 June 2019), initiated by French

Abroad: A Rebuttal, 2018, Business and Human Rights Journal, n° 3, p. 47; L. Dubin, Entreprise multinationale, Répertoire de droit international, Dalloz, 2021.

[200] See e.g., B. Cooreman, Addressing environmental concerns through trade: a case for extraterritoriality?, International & Comparative Law Quarterly, I.C.L.Q. 2016, 65(1), 229.

[201] See Terre solidaire, Sherpa, Le radar du devoir de vigilance, juillet 2021; S. Brabant, E. Savourey, All Eyes on France – French Vigilance Law First Enforcement Cases (1/2) Current Cases and Trends, 24 January 2020, https://www.cambridge.org/core/blog/2020/01/24/all-eyes-on-france-french-vigilance-law-first-enforcement-cases-1-2-current-cases-and-trends/#_edn13; Loi sur le devoir de vigilance – Panorama des premières mises en demeure et des saisines des tribunaux, 27 Avr 2020, https://www.cambridge.org/core/blog/2020/04/27/loi-sur-le-devoir-de-vigilance-panorama-des-premieres-mises-en-demeure-et-des-saisines-des-tribunaux/; E. Savourey, Loi sur le devoir de vigilance – Les enjeux juridiques des mises en demeure et des saisines des tribunaux, 27 avril 2020, https://www.cambridge.org/core/blog/2020/04/27/loi-sur-le-devoir-de-vigilance-les-enjeux-juridiques-des-mises-en-demeure-et-des-saisines-des-tribunau/.

[202] Notre Affaire A Tous, Sherpa, Les Eco Maires & ZEA "1,5°C: 13 French Local Authorities and 4 NGOs ask the French oil company Total to prevent global warming", 23 October 2019, available at: https://notreaffaireatous.org/wp-content/uploads/2018/10/DP-english.pdf; BHHRC, "14 Cities and NGOs call on Total to comply with French Duty of Vigilance Law", available at: https://www.business-humanrights.org/en/14-cities-ngos-call-on-total-to-comply-with-french-duty-of-vigilance-law.

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NGO les Amis de la Terre and Ugandan NGOs)[203] for land grabbing, intimidation, planned drilling in the heart of a natural protected area. The latter case gave rise to a conflict of jurisdiction between civil and commercial courts. Initially, the case was argued before the ordinary court (*tribunal judiciaire*) of Nanterre on 12 December 2019, which decided, in an ordinance dated 30 January 2020, to decline jurisdiction and refer the case to the Commercial Court of Nanterre.[204] The decision was confirmed by the Versailles Court of Appeal, in December 2020, but the NGOs finally won their case before the commercial chamber of the Court of Cassation, which recognised, a year later, their right of option between civil and commercial courts.[205]

- one at Teleperformance (18 July 2019), a company specialized in call centres, by NGO Sherpa and international trade union UNI Global Union, about the respect of union rights in its foreign subsidiaries.[206] Allegedly, four of Teleperformance's largest labour markets (India, the Philippines, Mexico and Colombia), accounting for half the workforce, are among the worst countries in the world in terms of labour rights violations; in association with UNIGLOBAL UNION in the USA.

- one against Électricité de France (EDF) and its subsidiary EDF Energies Nouvelles (1 October 2019), by indigenous human rights defenders, Mexican NGO ProDESC, and the European Centre for Constitutional and Human Rights (ECCHR)): the companies are accused of failing to consult and obtain the consent of indigenous communities located in the State of Oaxaca, southern Mexico, affected by the construction of a gigantic wind farm (300 megawatts and about a hundred turbines).[207]

– one against XPO Logistics Europe (1 October 2019), by the international trade unions International Transport Workers' Federation ("ITF"), the European Transport Workers' Federation ("ETF") and an alliance of unions) for allegedly failing to meet the requirements of the law in relations to labour issues in its supply chain.[208]

– one against Suez (9 July 2020), by FIDH, Ligue française des droits de l'Homme and two Chilean associations (Red Ambiental Ciudadana d'Osorno and Observatorio ciudadano) to detail its vigilance plan for its activities in Chile. The health crisis that occurred in 2019 was due, according to the associations, to "failures and illegalities" in the provision of the water supply service by Suez's Chilean subsidiary, Essal.

– one against Casino (21 September 2020), by several NGOs, including Mighty Earth, Envol vert, Notre Affaire à tous and Sherpa, to take the necessary measures to exclude beef from deforestation and the encroachment of indigenous territories from its supply chain in Brazil and Colombia;

– one against La Poste (December 2021), accused by a trade union (Fédération SUD PTT), for its labour practices in France: the company is accused of illegal lending of labour, undeclared work, lack of prevention plans for the employees of subcontracting companies;

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[203] Environment News Service (ENS), "Total Sued Under France's New Duty of Vigilance Law" (23 October 2019), available at: http://ens-newswire.com/2019/10/23/total-sued-under-frances-new-duty-of-vigilance-law/; AFP, "NGOs file suit against Total over Uganda oil project", The East African (24 October 2019), available at: https://www.theeastafrican.co.ke/business/NGOs-sue-Total-over-Uganda-oil-project/2560-5323092-r3aeku/index.html.

[204] TJ Nanterre, ord. réf., 30 janv. 2020, n° 19/02833 : JurisData n° 2020-007310.

[205] Com. 15 déc. 2021, n° 21-11.882, D. 2022.7.

[206] Sherpa, Sherpa and UNI Global Union send formal notice to Teleperformance calling on the world leader in call centers to strenghten workers' rights, 24 July 2019, available at: https://www.asso-sherpa.org/sherpa-and-uni-global-union-send-formal-notice-to-teleperformance-calling-on-the-world-leader-in-call-centers-to-strengthen-workers-rights-2.

[207] ProDESC, Indigenous human rights defenders and NGOs call on EDF Group to comply with its duty of vigilance regarding human rights prescribed by the French 'Duty of Vigilance' Law, 15 November 2019, available at: https://prodesc.org.mx/indigenous-human-rights-defenders/.

[208] ITF, Transport giant served notice under duty of vigilance law in landmark legal move, 1 October 2019, available at: https://www.itfglobal.org/en/news/transport-giant-served-notice-under-duty-vigilance-law-in-landmark-legal-move.

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– one against Yves Rocher (23 March 2022), by Sherpa, ActionAid France, the trade union Petrol-lş and 34 former employees of a Turkish subsidiary, for allegedly failing to fulfil its obligations with regard to trade union freedom and the fundamental rights of workers in Turkey;

– one against Mc Donalds France (March 2022), by a French trade union (CGT) and two Brazilian trade unions, which accuse the company of not having "identified the risks and [prevented] the serious violations of human rights and fundamental freedoms, the health and safety of people and the environment, resulting from [its] activities", both in France and at its Brazilian coffee and orange juice suppliers.

In five of these cases – involving Total (2), EDF, Suez, La Poste –, injunctive relief is being sought.

In March 2020, three major French banks (BNP Paribas, Natixis and Credit Agricole) were also identified by the NGO Global Witness as having funded projects allegedly contributing to deforestation in the Brazilian part of the Amazon, the Amazon Basin and the Congo and Papua New Guinea.

The Law n° 2021-1104 of 22 August 2021 "*on combating climate change and strengthening resilience to its effects*",[209] has added an optional sanction in the form of a possible exclusion of companies that do not comply with the obligation to adopt a vigilance plan from a public procurement process. This sanction is limited, however, to situations where the exclusion would not restrict competition or make it technically or economically difficult for the public authority to perform its public services.

30. **French duty of vigilance**. **Post-harm claims**. A breach of the company's duties regarding its vigilance plan entails liability and requires the company to remedy any harm that the execution of these duties could have prevented. This is no more than the application of general tort law.[210] The Constitutional Council insisted on the fact that the liability incurred by infringers is an ordinary case of personal liability and not a new case of vicarious liability. Therefore, the burden of proof lies with the claimants to prove the breach of the duty of vigilance, harm and a direct causal link between them;[211] only the victims of the infringements are allowed to file a liability suit; and companies could be sued for negligence. "The underlying reason of risk identification is precisely that a company can no longer plead ignorance."[212] "However, some companies may argue that they are technically unable to achieve effectively this identification throughout the scope of the Law."[213] So far, only two civil liability cases – involving Casino and Yves Rocher – seem to have been filed and are pending.

If, therefore, general tort law applies, one remains surprised, given the large number of places where faults could be committed and damage caused within the framework of global value chains, that the problem of international conflicts of laws is not dealt with. There is thus possible contradiction between this particular ground for liability of French parent companies and the international norms of conflict of laws that France is obliged to enforce, especially the Rome II Regulation.[214]

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[209] JORF n° 196 of 24 August 2021, Art. 35(V); Public procurement Code, Art. L2141-7-1.

[210] See A. Danis-Fatôme, G. Viney, La responsabilité civile dans la loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, Recueil Dalloz 2017 p. 1610. On the numerous questions raised by the international application of the law, see E. Pataut, Le devoir de vigilance – Aspects de droit international privé, Droit social, 2017, p 833; L. Sinopoli, Ancrer la "RSE" des multinationales – Pistes sur le terrain des conflits de lois, Cahiers de droit de l'entreprise, 2017, 5.

[211] In favour of a presumption of causality, see A. Danis-Fatôme, G. Viney, La responsabilité civile dans la loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, Recueil Dalloz 2017 p. 1610.

[212] Sherpa, Vigilance Plans Reference Guidance, First edition.

[213] Sherpa, Vigilance Plans Reference Guidance, op. cit.

[214] Regulation (EC) No 864/2007 of 11 July 2007 regarding the conflict of laws on the law applicable to non-contractual obligations. See A. Pietrancosta, É. Boursican, Vigilance: un devoir à surveiller !, JCP G 11 mai 2015, p. 553; H. Muir-Watt, Devoir de vigilance et droit international privé, in Dossier « La loi relative au devoir de vigilance – une perspective pratique et multidimensionnelle », dir. S. Brabant, et E. Savourey : Rev. int. Compliance, suplt. : JCP E 2017, n° 50, p. 48; E. Pataut, Le

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Finally, a certain punitive effect on a company's reputation may come under the law through the possibility for the court to order the publication, dissemination or posting of its decision of a company's breach (or an extract from it), according to the terms it specifies, and to have the convicted person bear the costs.

31. **Commercial or civil courts?** For injunctive or remedial actions, the lack of legal precision concerning the competent jurisdiction gave rise to a debate, linked to the existence in France of specialised commercial courts, made up not of ordinary judges but of elected lay judges representing the business world.[215] NGOs and trade unions expressed a clear preference for the competence of judicial courts, seen as more protective of fundamental rights and freedoms against company harms. After contradictory court rulings, which led to a decision by the Court of Cassation offering a jurisdictional option to plaintiffs not acting in a business capacity, Law 2021-1729 of 22 December 2021 "for confidence in the judiciary" finally conferred jurisdiction exclusively to the Paris judicial court alone to hear actions relating to the duty of vigilance based on Articles L. 225-102-4 and L. 225-102-5 of the Commercial Code. This exclusive jurisdiction entrusted to a judicial court will undoubtedly colour future case law on due diligence. While the idea of concentrating this litigation within a single court is understandable, in order to develop sufficient technical expertise to deal with these complex cases, the objective of unifying case law will be limited by the likely development of parallel litigation between traders within the same value chain.

32. **Application**. NGOs drew up an initial assessment of the implementation of the 2017 law.[216] This unilateral assessment is unsurprisingly rather critical.[217] Basically, it seems that not all companies have met their obligation to publish a vigilance plan. At the beginning of 2019, 96 companies had published a vigilance plan or had publicly acknowledged that they were subject to the law. Clearly, not all companies have met their obligation; sometimes, by mistake (Crédit Agricole, relating to the date of effectiveness of the Act), as a result of the Covid crisis[218] or temporary exemptions.[219] Progress appears to have been made, however. In 2020, the "due diligence radar" counted 265 companies subject to the law, of which 72 companies did not appear to have published a due diligence plan; in 2021, the figures were 263 and 44 respectively. Its authors even suggested to the Ministry of Finance to suspend all state aid to companies failing to publish vigilance plans.

When companies do comply, they sometimes face criticism for the content of their plans, particularly those which are short (only a few pages long), which could be indicative of an

devoir de vigilance - Aspects de droit international privé, Dr. soc. 2017.833; O. Boskovic, Brèves remarques sur le devoir de vigilance et le droit international privé, D. 2016.385.

[215] See A. Casado, De la juridiction compétente en matière d'actions corrélatives au devoir de vigilance, BJT 2022, n° 1, p. 3; D. Martin, J. Siret, Quelle compétence d'attribution et territoriale en cas de mise en cause du devoir de vigilance ?, Dalloz, 2021, p. 1044; Grégoire Leray, Équivoque sur la compétence juridictionnelle en matière de plan de vigilance, Revue des sociétés 2021, p. 297; S. Schiller, J.-M. Leprêtre et P. Bignebat, Revirement de position sur la compétence juridictionnelle pour l'application de la loi sur le devoir de vigilance, JCP E 2021.1323; P. Abadie, Les enseignements de la procédure sur la nature du devoir de vigilance : entre contestation relative aux sociétés commerciales et contestation relative à la responsabilité sociale, D. 2021. 614; H. Bérion, Quelle compétence pour la loi sur le devoir de vigilance ?, RICEA 2021. Comm. 86.

[216] See B&L, edh, Application of the law on the corporate duty of vigilance, vigilance plans 2018-2019, June 2019 et vigilance plans 2019-2020, December 2020; actionaid et alii, The law on duty of vigilance of parent and outsourcing companies. Year 1: companies must do better, Feb. 2019; Sherpa, Vigilance Plans Reference Guidance, First edition; Terre solidaire, Sherpa, Le radar du devoir de vigilance. Identifier les entreprises soumises à la loi, 1st ed. 2019, 2nd ed. June 2020, 3rd ed. July 2021.

[217] *Adde*, however, Loi sur le devoir de vigilance : analyse des premiers plans de vigilance par EY, EY, sept. 2018; P. Barraud de Lagerie, É. Béthoux, R. Bourguignon, A. Mias, É. Penalva-Icher, Mise en œuvre de la Loi sur le devoir de vigilance – rapport sur les premiers plans adoptés par les entreprises, novembre 2019 ; General Council of the Economy, op. cit.; Rapport Ass. Nat., n° 5124, 24 février 2022, op. cit.

[218] RATP, Rapport financier et RSE 202, p. 91.

[219] See for the SNCF, Lettre du 19 avril 2021, referring to Art. 22 IV of the ordinance 2019-552 of 3 June 2019.

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insufficient consideration for the new legal requirements. Many plans also lack precision and contain gaps. The majority of them do not define the scope of the plan, notably with regard to suppliers and subcontractors."[220] "Most of these plans do not enable one to understand precisely which risks have been identified by the businesses, their location within the group and even less how companies respond to them".[221] "In many plans, the actions and measures are not detailed enough and only very partially address the risks mentioned in the mapping."[222] Engaging with stakeholders in 2018 is explicitly mentioned by one in five companies. "Very few companies stated that they have presented their plan to stakeholders. Where this has been done, it has been to employee representative bodies or external stakeholder committees that have already been established by the companies."[223] This is, however, an ongoing process and progress is being made: 25% of companies have set up dedicated steering committees; 35% of companies mention the monitoring of the plan by Board Committees (CSR, ethics, audits, etc.).

Finally, the first plans appear "very heterogeneous, indicating that, faced with this new exercise, each company has applied this law with different stringency levels, with the majority of the plans still focusing on the risks for the companies rather than those for third parties or the environment."[224] Most of the companies reviewed merely transpose their reporting practices or social liability commitments into their vigilance plans.[225] This has to do with the fact that the CSR or Sustainable Development departments are usually in charge of overseeing the approach within companies. "Even more worrying is that the companies have frequently stated the risks that possible human rights abuses could cause for the company and its performance."[226] With regard to risk mapping or reviewed procedures for identifying existing at-risk suppliers, mainly using criteria based on the suppliers' geographic location and business activity[227], the responses fall within the scope of existing responsible procurement approaches, in particular: asking suppliers to comply with the company's own commitments by signing a CSR charter or code of conduct; suppliers assessments, often performed by specialized independent contractors; auditing suppliers considered to pose the greatest risk."[228] Even the official evaluation of the plans highlighted this propensity of companies to understand vigilance as a tool to protect their own interest and reputation, and to turn their approach towards themselves and not the outside world.[229] This position is in line with that of the NGOs, who expect companies to move away from the auditing and compliance logic to ensure that they concretely modify their business models and practices, with their subsidiaries, suppliers and subcontractors established throughout the world, so that they would not be viewed as complicit in serious violations of human rights or the environment.[230]

Others, however, have praised the effectiveness of the law and the change regarding sustainability matters it has triggered in such a short time in value chains.[231] In particular, the European Commission stressed how the French duty of vigilance had shown "how – irrespective of personal scope – its impact trickles down the value chain and obligations are shifted on suppliers mostly without recognition (for instance in prices): 80% of French SMEs and midcaps

[220] actionaid et alii, The law on duty of vigilance of parent and outsourcing companies. Year 1: companies must do better, op. cit., p. 12.

[221] Sherpa, Vigilance Plans Reference Guidance, op. cit., p. 10.

[222] The Law on Duty of Vigilance of Parent and Outsourcing Companies. Year 1: Companies Must Do Better, op. cit., p. 17.

[223] B&L, edh, Application of the law on the corporate duty of vigilance, 1st edition, op. cit., p. 10.

[224] The Law on Duty of Vigilance of Parent and Outsourcing Companies. Year 1: Companies Must Do Better, op. cit., p. 10.

[225] The Law on Duty of Vigilance of Parent and Outsourcing Companies. Year 1: Companies Must Do Better, op. cit., p. 15.

[226] The Law on Duty of Vigilance of Parent and Outsourcing Companies. Year 1: Companies Must Do Better, op. cit., p. 15.

[227] B&L, edh, Application of the law on the corporate duty of vigilance, 1st edition, op. cit., p. 14.

[228] B&L, edh, Application of the law on the corporate duty of vigilance, 1st edition, op. cit., p. 15.

[229] General Council of the Economy, op. cit.

[230] Terre solidaire, Sherpa, Le radar du devoir de vigilance. Identifier les entreprises soumises à la loi, July 2021, p. 9.

[231] See General Council of the Economy, op. cit.

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(which are out of the French law's scope) are asked by their contractors on CSR issues, whether to sign a charter or a code of conduct, to declare themselves in conformity with the main social and environmental standards (health/safety, waste management, business ethics or human rights), to sign clauses in their contracts or to undergo an extra-financial evaluation".[232]

33. **The CS3D enforcement regime**. In contrast to the French duty of vigilance,[233] which many of its promoters considered toothless after the pecuniary sanctions initially provided for were declared unconstitutional, the European proposal published on February 23, 2022, is impressive in respect of the enforcement apparatus it puts in place.

At public level, the proposed system is based on national "*supervisory authorities*".[234] Each Member State would have to designate one or more authorities responsible for supervising compliance with human rights / environment due diligence (Articles 6 to 11) and combating climate change obligations (Article 15(1) and (2))[235]. One could imagine, for example, the creation of authorities specialized[236] in one or more of the areas covered by the Directive. The complexity that could result, particularly for companies, is supposed to be mitigated by the obligation to define the respective competences of these different authorities and to work closely and effectively with one other. The independence of these authorities, in particular from the companies falling within the scope of the Directive or from other market interests, will have to be guaranteed, as will these authorities' impartiality, transparency and respect for professional secrecy.

Each of the supervisory authorities should have "*adequate powers and resources*" to carry out its mission,[237] including the power to request information and conduct investigations, on its own initiative or on the initiative of a third party expressing "*substantiated concerns*".[238] The possibility for natural and legal persons to submit substantiated concerns to a supervisory authority "*when they have reasons to believe, on the basis of objective circumstances, that a company is failing to comply with the national provisions adopted pursuant to this Directive*" is the functional equivalent of pre-emptive claims under French law. The inspections may, by exception, be carried out without prior warning where prior notification hinders their effectiveness; and on the territory of another Member State, with the assistance from the local supervisory authority. When a company fails to comply with national provisions adopted pursuant to the CS3D, including in cases where no harm is suffered, it is afforded "*an appropriate period of time to take remedial action, if such action is possible*".[239] Generally, all national supervisory authorities must have at least the power to: order the cessation of infringements, abstention from any repetition of the relevant conduct and, where appropriate, remedial action proportionate to the infringement and necessary to bring it to an end; adopt interim measures to avoid the risk of severe and irreparable harm; and impose pecuniary sanctions.[240] The sanctions provided for nationally would be effective, proportionate and dissuasive.[241] Contrary to the

[232] Commission Staff Working Document, Impact Assessment Report, op. cit., p. 27.

[233] On the proposal to strengthen the enforcement of the duty of vigilance, notably through the establishment of an empowered administrative authority, see Rapport Ass. Nat., n° 5124, op. cit., p. 75.

[234] Art. 17.

[235] With the exception therefore of the provisions on remuneration (Art. 15(3)).

[236] Member States may also designate the authorities for the supervision of regulated financial undertakings also as supervisory authorities for the purposes of this Directive (Art. 17(3)).

[237] Art. 18(1).

[238] Art. 19.

[239] Art. 18(4).

[240] However, where the national legal system does not provide for administrative sanctions, these provisions "*may be implemented in such a manner that the sanction is initiated by the competent supervisory authority and imposed by the competent national courts*" (Art. 18(6)).

[241] Art. 20.

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French draft law on the duty of vigilance, the European proposal provides that sanctions imposed by the supervisory authorities must be based on the company's turnover,[242] take into account the company's compliance and remedial efforts, and all be published.[243] Given the severity of penalties so calculated, it should be made clear whether natural persons, such as company directors, are covered by these provisions. The proposal adds that every person affected by a supervisory authority's legally binding decision "*has the right to an effective judicial remedy*".[244] Some will certainly consider that more specifications regarding the sanctioning power of the supervisory authorities, concerning in particular its nature or amount, would have helped ensure a better level playing field within the EU. An additional disenfranchisement will automatically attach to a sanction imposed on a company for failure to comply with the obligations of the Directive. This would consist of a ban for "*public support*",[245] which is a drastic measure and could be considered a double jeopardy for the targeted company. Given its importance, one would have expected that the proposal would define clearly the term "*public support*", preferably perhaps in terms of its nature and duration.

As regards the jurisdiction of the supervisory authorities, the European proposal retains different criteria depending on whether the qualifying companies are European or non-European. The former are subject to the supervisory authority of the Member State in which they have their registered offices.[246] This criterion has the advantage to simplify identification, compared to the ones based on the companies' real seats or economic activities. It is also the one used to designate the « *Member State competent to regulate matters covered in this Directive* », i.e. the applicable national law within the EU.[247] Things are different for non-EU companies. Since such companies do not have registered offices in the EU, the proposal tries to make a jurisdictional connection on the basis of a main structural criterion or, where this is non-existent or insufficient, a functional criterion. Thus, when the non-EU company has a branch in a Member State, it is supervised by the authority of that State. If a non-EU company does not have a branch in any Member State or has branches located in different Member States, the competent supervisory authority is that of the Member State in which it generated most of its net turnover in the European Union,[248] which necessarily leads in the first case and possibly in the second one to designate an authority of a State in whose territory the company has no branch. This allocation of jurisdiction would not be intangible, however, since non-EU companies could make "*a duly reasoned request to change the supervisory authority*", "*on the basis of a change in circumstances leading to it generating most of its turnover in the Union in a different Member State*", this precaution being undoubtedly taken to limit the risk of legal forum shopping disconnected from economic activity. It is not impossible to think, however, that a company could seek to engage in forum shopping through the opportunistic installation of a branch in a Member State solely to compel use of its jurisdictional authority. Regarding non-EU companies, one cannot help but notice that, contrary to what is provided for their European counterparts, the proposal does not designate which law is applicable to them. An analogy to EU companies and the existing international principle of mandatory law would suggest applying the law of the Member State of the supervisory authority.

[242] In Germany, the Federal Office for Economic Affairs and Export Control (BAFA), which is under the Federal Ministry of Economics and Energy, may impose administrative fines of up to EUR500,000 or in some cases up to 2 per cent of the annual turnover of very large companies. Companies that have been subject to such fines may be excluded from public procurement procedures for a maximum of three years. In Norway, the Consumer Authority is charged with monitoring and enforcing the law and may impose fines for breaches of the duties enshrined in the Act.

[243] Art. 20.

[244] Art. 18(7).

[245] Art. 24.

[246] Art. 17(2).

[247] Art. 2(4).

[248] Art. 17(3).

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In order to "*facilitate the cooperation of the supervisory authorities and the coordination and alignment of regulatory, investigative, sanctioning and supervisory practices of the supervisory authorities and, as appropriate, sharing of information among them*", the Commission would set up a "*European Network of Supervisory Authorities, composed of representatives of the supervisory authorities*".[249] Such a network should help to limit the risks of forum shopping among national authorities, inherent in the choice of decentralised rather than European supervision.

34. **Civil liability**. The EU proposal sets out civil-liability rules to address the current divergences at national level.[250] According to the Commission, "this fragmentation would lead to distortions of competition in the internal market". In addition to the differences among general national liability regimes, the Commission refers to the contradictions among special diligence regimes, notably the French one, which includes a provision on civil liability, and the German *Sorgfaltspflichtengeset*, which clarifies, in line with the UNGPs, that a violation of an obligation under the law does not give rise to any civil liability while general liability rules remain unaffected. Both French and German regimes nonetheless converge to avoid making non-compliance with due diligence alone a basis to trigger a company's civil liability, in the absence of harm. Conversely, compliance does not guarantee a safe harbour. As exposed in the UNGPs, if conducting appropriate human rights due diligence helps business enterprises "address the risk of legal claims against them by showing that they took every reasonable step to avoid involvement with an alleged human rights abuse", "business enterprises conducting such due diligence should not assume that, by itself, this will automatically and fully absolve them from liability for causing or contributing to human rights abuses".[251]

Following the French model,[252] the European proposal expressly chooses to impose civil liability on companies failing to comply with the diligence obligations laid down in Articles 7 and 8, when, as a result of this failure, an adverse impact that should have been identified, prevented, mitigated, brought to an end or its extent minimised through the appropriate measures laid down in these articles occurred and led to damage.[253] A number of clarifications are also made. In particular, it is stated that the civil liability of a company is "*without prejudice to the civil liability of its subsidiaries or of any direct and indirect business partners in the value chain*".[254] The fault and legal liability of a parent company do not therefore exclude those of its subsidiaries, any more than the liability of a subsidiary automatically imposes liability on its parent, a reality which may disappoint some supporters of the abolition of limited liability and the veil of legal personality in such circumstances. The creation of a due diligence obligation at the level of the parent company certainly exposes the latter to a direct action for damages by the possible victims of one of its subsidiaries, without however instituting group liability. The increase in the pivotal company's liability does not abolish the personal liability of the companies

[249] Art. 21.

[250] Art. 22.

[251] Principle 17, Commentary.

[252] For a comparison, see A. Danis-Fatôme, La responsabilité civile dans la proposition de directive européenne sur le devoir de vigilance, Dalloz 2022 p. 1107.

[253] On the "progressive defragmentation of the liability of companies within a corporate group", see e.g. C. Bright, A. Marx, N. Pineau and J. Wouters, Toward a Corporate Duty for Lead Companies to Respect Human Rights in Their Global Value Chains?, Business and Politics 2020; 22(4): 667. On the different paths followed by the US and the UK, see R. Chambers, Parent company direct liability for overseas human rights violations: lessons from the U.K. supreme court, 520 U. Pa. J. Int'l L., Vol. 42:3, 521 (2021); F. Bagherzadeh, Multinational Corporations' responsibility for Tortious and Human Rights Violations: A Comparative Study, Cardozo Int'l & Comp. L. Rev., Vol. 4:3, 857 (2021); *adde*, the dismissal of a lawsuit, based on the Alien Tort Statute, accusing Cargill Inc and a Nestle SA subsidiary of knowingly helping perpetuate slavery at Ivory Coast cocoa farms, on the grounds that the claim did not show that any of the relevant conduct took place within the United States, see Lawrence Hurley, U.S. Supreme Court rules for Nestle, Cargill over slavery lawsuit, Reuters, June 17, 2021.

[254] Art. 22(3).

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covered by its due diligence policy, or make it an unconditional guarantor. The commitment to the principle of direct liability for personal fault is also underlined, in this provision, by the alignment of treatment of subsidiary companies and simple direct or indirect commercial partners. Regrettably, the coordination between national procedures targeting several subsidiaries or entities belonging in the same value chain or their outcomes is not addressed. As mentioned, the civil liability of a company for damages caused by an adverse impact arising as a result of the activities of an indirect partner with whom it has an established business relationship is limited to cases where "*it was unreasonable, in the circumstances of the case, to expect that the action actually taken, including as regards verifying compliance, would be adequate to prevent, mitigate, bring to an end or minimise the extent of the adverse impact*".[255] It is understandable that a qualified fault is necessary here, otherwise the difference with the liability regime concerning direct partners would disappear. This standard appears, however, to be open, vague and prone to a significant retrospective bias, as courts are inherently called upon to rule *ex post* on the basis of actual damage caused despite all precautions taken, which could lead companies to seek more legislative clarity, predictability and protection. In this respect it should be clarified. These civil liability rules are of a minimum nature, as their application does not prevent liability under Union or national stricter rules related to adverse human rights impacts or to adverse environmental impacts.[256] It is regrettable, in terms of harmonisation, that more details are not given, for example, on the relationship between these European rules and current national rules, or on the relationship between the liability of legal entities and the personal liability of their directors. Of minimum nature, these rules are, however, of "*overriding mandatory application in cases where the law applicable to claims to that effect is not the law of a Member State.*"[257] Such mandatory application, called for in the European Parliament, would therefore trump the normal operation of conflict rules on non-contractual obligations set out in the Rome II European Regulation, which in principle designate the *lex loci damni* i.e. "*the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred*", unless, in case of environmental damage, "*the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred*".[258] Internationally, the European Union would thus be one of the most accessible territories to actions brought by victims of damages located outside its territory, an ease of access to remedy that forms the third pillar of the UNGPs.[259]

[255] Art. 22(2). For a criticism of such provision, on the ground that it would contradict UNGP 17, see A. Lafarre, Mandatory Corporate Sustainability Due Diligence in Europe The Way Forward, OBLB, 21 April 2022.

[256] Art. 22(4).

[257] Art. 22(5).

[258] Regulation (EC) n° 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), Art. 4 and 7. See O. Boskovic, Les aspects de droit international privé du devoir de diligence et de la responsabilité des entreprises : bilan d'étape, D. 2022, p. 185.

[259] On the dichotomy between UK and US law on the subject, see e.g. Rachel Chambers, Parent company direct liability for overseas human rights violations: lessons from the U.K. supreme court, U. Pa. J. Int'l L., Vol. 42:3, 2021, p. 519.

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PART II. ENLIGHTENMENTS THROUGH CSR OF COMPANY LAW: THE FRENCH "PACTE LAW" AND THE EUROPEAN PROPOSAL ON DIRECTORS' DUTY OF CARE

35. The 2019 PACTE law is driven by political objectives that are even more ambitious, both theoretically and legally. Its aim is no less than to "rethink the place of companies in society" and help France have companies that are "fairer", more socially responsible and long-term oriented. This evolution is part of a movement based on three ideas: firstly, the stated desire to keep its distance from an economic system that President Macron, in his vows to the French people, called "ultraliberal", overly financial and short-termist; secondly, the will shown by the Minister of Economy, Bruno Le Maire, that French companies become more socially responsible and play their full part in contributing to the common good; finally, the possibility to reconcile long-term economic profitability with social and environmental objectives.

36. In terms of CSR, the PACTE law has made a triple contribution to company law. It sets up a "three-stage rocket", consisting of a broadening of the "company's interest" concept, the introduction of the notion of "*raison d'être*" and the label of "*société à mission*", of which only the first stage is mandatory.[260]

A. THE NEW FRENCH LAW MANDATORY PROVISIONS BROADENING THE "COMPANY'S INTEREST" CONCEPT AND THE CONTEMPLATED INTRODUCTION OF A EUROPEAN DIRECTORS' DUTY OF CARE

37. The 2019 PACTE law modified Article 1833 of the Civil code, a provision applicable to all French companies, whatever their legal form. Formerly, Article 1833 provided that a company "*must have a lawful purpose and be formed in the common interest of the shareholders*". The PACTE law added a new paragraph, stating that: "*The company is managed in its corporate interest, taking into consideration the social and environmental stakes linked to its business*."[261]

[260] See A. Pietrancosta, "Intérêt social" and "raison d'être": Thoughts about two core provisions of the Business Growth and Transformation Action Plan (PACTE) Act that amend corporate law, Annales des Mines - Réalités industrielles, Nov. 2019, p. 55.

[261] See M.-H. Brissot, Loi Pacte, la responsabilité sociale consacrée ? », Décideurs Magazine, 15 oct. 2018; P. Portier, Loi Pacte et intérêt social : contrainte ou opportunité ?, Option Finance, n° 1484, 5 nov. 2018, p. 40; A. Milleret, La nouvelle définition de l'entreprise pose problème, Option Finance, n° 1485, 12 nov. 2018, p. 12; J. Paillusseau, Entreprise et société. Quels rapports ? Quelle réforme ?, D. 2018, p. 1395; F.-X. Lucas, L'inopportune réforme du Code civil par la loi PACTE, Bull. Joly Sociétés, sept. 2018, p. 477; M. Germain, Les propositions du Club des juristes, Rev. sociétés 2018, p. 564 ; A. Tadros, Regard critique sur l'intérêt social et la raison d'être de la société dans le projet de loi PACTE, D. 2018, p. 1765; P.-Y. Bérard, L'intérêt social et la raison d'être des sociétés, Rev. Banque, 2018/9, n° 823, p. 83 ; D. Schmidt, Réduire les pouvoirs des actionnaires ?, Bull. Joly Sociétés, sept. 2018, p. 285; D. Gallois-Cochet, M. Laroche, Projet PACTE, quel impact ?, Gaz. Pal., 3 avr. 2018, p. 42; P.-H. Conac, La société et l'intérêt collectif : la France seule au monde ?, Dossier « La réécriture des articles 1833 et 1835 du Code civil : révolution ou constat ? », Rev. sociétés 2018, p. 558; J.-J. Daigre, Loi PACTE : ni excès d'honneur, ni excès d'indignité », Bull. Joly Sociétés, oct. 2018, p. 541; A. Couret, Faut-il réécrire les articles 1833 et 1835 du Code civil ?, D. 2017, p. 222; M. Roussille, Projet de loi PACTE : quel impact ? – Réflexion sur la consécration de l'intérêt social et de la raison d'être de la société », Dr. sociétés 2018, étude 10; T. Massart, Réforme des articles 1833 et 1835 du Code civil : l'équilibre entre performance financière et extra-financière des sociétés, Gazette du Palais, 18 déc. 2018, n° 44, p. 51; A. Pietrancosta, "Intérêt

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38. This revision has been fiercely debated and widely covered by the media. The idea goes back a few years. The starting point is certainly the financial crisis,[262] which generated a new spread of pro-stakeholder doctrines, in reaction to the alleged excesses of pro-shareholder ones. There go the economic and regulatory cycles,[263] which probably explains why what some view as a revolution others see as a restoration.[264] According to some, this transition from traditional CSR requirements to enlightened company interest rules reflects the transition from the 20th to the 21st century, paving the way to what may become the "millennial corporation".[265] Interestingly, large French stock corporations subject to the NFRD were already required to present information on how the company "*takes into account the social and environmental consequences of its activity*".[266]

39. In France, several proposals from public sources were issued from 2013 onwards, revising Article 1833 of the Civil Code. Some advocating a multifiduciary model, inspired by foreign models, under which the company has to be managed in the plural interest of its stakeholders, others the imposition of a general economic, social and environmental duty. In September 2013, the "Attali Report", entitled "For a Positive Economy", proposed the following wording: "Every company must have a lawful purpose, be incorporated and managed in the plural interest of its stakeholders and contribute to the general interest, in particular the economic, environmental and social interest." In 2015, Emmanuel Macron, then Minister of Economy, took up the idea of the Attali Commission, of which he was Secretary General, but proposed to focus on the best interest of the company as a whole: "Any company must have a lawful purpose and be incorporated in the common interest of the shareholders. It must be managed in the best interests of the company, with due regard to the general economic, social and environmental interest". The proposal was finally withdrawn after doubts cast on its constitutionality.

Once President, Emmanuel Macron decided to revisit this idea and establish working groups, in order to reach an acceptable compromise. Having personally participated in this preparatory work and warned against the legal uncertainty that could result from such a reform in terms of companies' and managers' liability, I was able to witness the desire of the chairs of these groups to propose a reform that sends a strong political signal, while preventing contentious outbursts. The proposal was therefore made to require companies to take into consideration the social and

social" and "raison d'être": Thoughts about two core provisions of the Business Growth and Transformation Action Plan (PACTE) Act that amend corporate law, Annales des Mines - Réalités industrielles, Nov. 2019, p. 55.

[262] For the most recent period, see Loi Pacte et raison d'être, ORSE, 2020, p. 7.

[263] See the early denunciation of the new orthodoxy of corporate social responsibility by Theodore Levitt, well before Milton Friedman's famous diatribe (The Social Responsibility of Business is to Increase its Profit, The New York Times Magazine, September 13, 1970), in The Dangers of Social Responsibility, Harvard Business Review, 36, 41-50 (1958).

[264] See e.g. L.E. Strine, Jr., Restoration: the role stakeholder governance must play in recreating a fair and sustainable American economy, 76 Bus. Law. 397 (2021), in response to Edward Rock, For Whom Is the Corporation Managed in 2020? The Debate Over Corporate Purpose, 76 Bus. Law. 363 (2021); L. Stout, The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations, and the Public, Berrett-Koehler Publishers, 2012.

[265] M. Barzuza, Q. Curtis & D. Webber, The Millennial Corporation, (2021), available at: https://scholarship.law.bu.edu/faculty_scholarship/1172.

[266] Code of commerce, Art. L. 225-102-1.

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environmental issues of their businesses, an objective expression designed to avoid mentioning various categories of vested interests,[267] in contrast to many foreign national examples.[268]

40. That is exactly what the initial draft did, supplementing Article 1833 by a paragraph providing that: "*The company is managed in its corporate interest and in considering the social and environmental stakes linked to its business*." For stock corporations, the wording is repeated in the provision of the Commercial code, which defines the general power of the board of directors: "*The Board of Directors determines the orientations of the company's business and ensures their implementation, in accordance with its corporate interest and taking into consideration its social and environmental issues*."[269] The government's intention is clearly to encourage the legislative recognition of a higher interest of the company as a legal entity above all its stakeholders, including shareholders.

As concerns had again arisen, however, about the meaning and binding force of this new provision, amendments have been introduced in order to provide some reassurance.

The Council of State (i.e. the highest public law court in the country, acting here as a State legal adviser), advocated the substitution of the expression "*taking into consideration*" for the initial one "*considering*", so that the new provision only reflects a general concern for the company and not a precise normative goal that must be achieved. It explained that this replacement "strongly limits the normative impact of the inclusion of social and environmental issues in the company's management and in its corporate interest". The Council of State also recalled that by not amending the provisions of Article 1832 of the Civil Code, which sets profit-seeking as the legal purpose of companies, the aim or effect of the draft law is not to change the nature, essential elements or purposes of French companies.

At the National Assembly, two other amendments were made. The first replaced the word "*and*" by a simple comma, in order to "reconnect" the consideration for social and environmental issues with the company's interest. It is not certain, however, that the change is in line with the reassuring interpretation of the Council of State, according to which the two elements (management in the company's interest / consideration for social and environmental issues) are separate, only the first one constituting an actual requirement. The second one (amendment of 1844-10 of the Civil Code) intended to avoid the risk of nullification of an internal company decision deemed *ex post* not having complied with the new requirement included in Article 1833.

For its part, the Senate strongly opposed the modification of Article 1833 on the ground that the reform would impose on French companies general social and environmental requirements

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[267] Compare with the UK companies act (Section 172(1)): "*A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to: (a) the likely consequences of any decision in the long term, (b) the interests of the company's employees, (c) the need to foster the company's business relationships with suppliers, customers and others, (d) the impact of the company's operations on the community and the environment, (e) the desirability of the company maintaining a reputation for high standards of business conduct, and (f) the need to act fairly as between members of the company.*"

See the current "Better Business Act campaign", calling for an overhaul of Section 172 to restate the purpose of a company from "promoting success" to "advancing its purpose". It would do so "*as to benefit its members as a whole, whilst operating in a manner that also— (a) benefits wider society and the environment in a manner commensurate with the size of the company and the nature of its operations; and (b) reduces harms the company creates or costs it imposes on wider society or the environment, with the goal of eliminating any such harm or costs*" https://betterbusinessact.org/about-the-act/; Simon Mundy, Tamami Shimizuishi and Patrick Temple-West, The mission to redefine UK corporate purpose, FT, 13 April 2022.

[268] See Commission Staff Working Document, Impact Assessment Report, op. cit., p. 36.

[269] Art. L. 225-35 C. com. Since law No. 2022-296 of 2 March 2022 aimed at "*democratising sport in France*", the words: "*taking into consideration social and environmental issues*" have been replaced by the words: "*considering social, environmental, cultural and sporting issues.*" Following the distinction made by the Council of State, this would be tantamount to recognising that this parliamentary amendment, approved by the government, entails a tightening of the resulting obligation, even if no such intention was expressed at any time during the debates and it is likely that this amendment is merely a clerical error by the legislature. Unlike Article 1833 of the Civil Code, however, Article L. 225-35 requires such "*consideration*" only in the exercise by the board of directors of a corporation of its general competence to determine the "*orientations of the company's activity*".

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with undefined content, which could be criticized constitutionally, and that such modification would create an unnecessary legal and litigation risk for millions of French companies, especially small and medium ones.

In the meantime, the AFEP-MEDEF corporate governance code, whose recommendations are broadly followed by large French listed companies, was amended in June 2018 to redefine the core mission of boards of directors, now saying that: "*The Board of Directors performs the tasks conferred by the law and acts at all times in the corporate interest. It endeavours to promote long-term value creation by the company by considering the social and environmental aspects of its activities*".

41. Paradoxically, this amendment to Article 1833 introduces the first general provision stating that a company must be managed in its corporate interest. French company law has enshrined the notion of corporate interest, but without stating it, let alone defining it! This is deliberate: the relevance of its practical application is based on its great flexibility, which makes it resistant to any confinement within pre-established criteria. At least, it is agreed the provision means that companies are not managed in the interest of particular persons, but in their autonomous interest and in the pursuit of their own purposes. This would only be the confirmation of case law, as emphasized by the PACTE law impact assessment.[270] The predominance of the corporate interest over the shareholders' personal interests derives from the very purpose of a company. Thus, the shareholders' personal interests are subordinated to the shareholders' common interest, which itself is subject to the corporate interest, the latter being the only one that includes all the others and can bring them together in compliance with the legal definition of a company.

It was also meant to ensure that management decisions[271] cannot lead to favouring short-term profit over the ability to develop and make long-term profits. It is not entirely sure that the new provision does exactly that. Let's recall that despite the popularity of long-termism, largely due to an extraordinary promotion in the political and media spheres, which often leads to simplifying or even caricatural allegations that inevitably end up with presenting States or legislators as a liberators of short-term and self-destructive market pressures, the existence of a general imperfection of the market which would lead to an endemic problem threatening companies or even a mode of capitalism remains widely contested scientifically.[272] This is amply demonstrated by the lasting vigour of American capitalism, which has been accused for the past 40 years, particularly on this side of the Atlantic, of being doomed to failure by dint of short-term blindness. Apart from the fact that there are also companies with a limited lifespan and that many long-term projects are short-term projects that have gone wrong, long-termism is not a panacea. There also exist long-term biases, variations of optimism and overconfidence biases, with their undesirable consequences, including overvaluation, overinvestment, ineffective governance structures, status quo problems and agency costs,[273] the ultimate evil being bad-termism, short or long.[274]

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[270] Étude d'impact relatif au projet de loi relatif à la croissance et la transformation des entreprises, 20 juin 2018, p. 543. V. égal. CE, avis, 14 juin 2018, nos 394599 et 395021, sur un projet de loi relatif à la croissance et la transformation des entreprises, n° 98.

[271] In the broad sense of the term, see Didier Poracchia, De l'intérêt social à la raison d'être des sociétés, Bulletin Joly Sociétés, 2019, n° 06, p. 40.

[272] See eg., M.J. Roe, Missing the Target: Why Stock-Market Short-Termism Is Not the Problem, OUP, 2022; Stock market short-termism's impact, University of Pennsylvania Law Review [Vol. 167: 71] (2018); M.J. Roe, R. Shapira, The power of the narrative in corporate lawmaking, Harvard Business Law Review, 11 Harv. Bus. L. Rev. 233, Summer, 2021; T. Strand, Re-thinking short-termism and the role of patient capital in Europe: perspectives on the new shareholder rights directive, October 29, 2014, et Short-termism in the European Union, 22 Colum. J. Eur. L. 15, 2015.

[273] See M. Barzuza and E. Talley, Long-Term Bias. Virginia Law and Economics Research Paper No. 2019-05; European Corporate Governance Institute (ECGI) - Law Working Paper No. 449/2019. Available at SSRN: https://ssrn.com/abstract=3338631 or http://dx.doi.org/10.2139/ssrn.3338631.

[274] A. Verstein, Wrong-Termism, Right-Termism, and the Liability Structure of Investor Time Horizons, 2018, https://ssrn.com/abstract=3227153.

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42. The remaining part of the amendment, its requirement to take into consideration social and environmental issues, is more novel and consequently raises a number of questions. The first one concerns its scope of application. It can be seen as too narrow, since it only applies to companies, and not to all forms of undertakings. The reason for this limitation was never exposed. Worst, the debates revealed a high degree of confusion between companies and businesses. Conversely, the scope of application can be considered too wide, since it covers millions of companies, notwithstanding their size or relevance in terms of social or environmental impact. We were among the ones to suggest that this provision be preferably located in the corporate governance code, on the German[275], Dutch or South African[276] models, in order to target only the largest companies, but this suggestion did not go along with the will of the Macron government to make this reform highly emblematic. It is revealing, however, that only the provisions relating to stock corporations, and not to other legal forms of companies, were amended accordingly.

43. Secondly, the legal and practical implications of the reform remain uncertain. It is difficult to assess the extent to which it changes the state of positive law. Indeed, there are elements of stability that should not be underestimated. This is the case with the very definition of a company in Article 1832, which continues to set the company's main purpose of making a profit. Contrary to what some have argued, the new law does not impose on companies an equation intended to equally maximize three major variables: economic and financial value, social value, and environmental value. It reverses even less the causal relationship between profit and stakeholder or social value, which some call for.[277] And if shareholder personal values[278] may enlighten it, they are not intended to replace the traditional concept of shareholder value. Although such instrumentalist approach may disappoint ethicists guided by Kantian imperatives,[279] in corporate law, at least on the books, profit remains the legal end goal, and stakeholder value is relevant as a means to create profits. Responsibility should not be confused with altruism.[280] Unlike the abovementioned due diligence requirements, framed in deontological terms as serving the interests of external affected parties and the environment, irrespective of profit, consistent with the initial conception of CSR,[281] here the end goal remains self-centered (profit), only subject to constraints. This perspective makes it possible to mitigate the risks inherent to a provision that encompasses an external or inside-out dimension of a company's decisions through the mandatory consideration of social and environmental factors, in requiring a favourable impact of

[275] See the review of the German corporate governance code in 2020: "*By their actions, the company and its governing bodies must be aware of the enterprise's role in the community and its societal responsibility. Social and environmental factors influence the enterprise's success. In the enterprise's best interests, Management Board and Supervisory Board ensure that the potential impact from these factors on company strategy and operating decisions is identified and addressed.*"

[276] South Africa 2016 (King IV Report on Global Governance): organizations take their legitimacy from society as a whole, and as a result must consider "*what impact they are having on critical aspects of society and the environment*" as well as how their decisions impact material stakeholders.

[277] See not. A. Edmans, Grow the Pie: How Great Companies Deliver Both Purpose and Profit, Oxford, 2020.

[278] See C. Sampford and V. Berry, Shareholder values, not shareholder value. The Role of 'Ethical Funds' and 'Ethical Entrepreneurs' in Connecting Shareholders' Values with Their Investments, 116 Griffith Law Review (2004) Vol. 13 N° 1; O. Hart & L. Zingales, Companies Should Maximize Shareholder Welfare Not Market Value, 2 J.L. Fin. & Acct. 247 (2017) and The New Corporate Governance, University of Chicago, Becker Friedman Institute for Economics Working Paper No. 2022-55, https://ssrn.com/abstract=4094175; M. Barzuza, Q. Curtis, David Webber, Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance, 93 S. Calif. L. Rev. 1243 (2020); K. Pattit, J. Pattit, The case for a thick shareholder concept, Bus Soc Rev. 2019, 124:497.

[279] See M. Roggea, Humanity Constrains Loyalty: Fiduciary Duty, Human Rights, And The Corporate Decision Maker, (2021) 26 Fordham J. Corp. & Fin. L. 147.1.

[280] See C.D. Stone, Where the Law Ends, op. cit. p. 111.

[281] See D.S. Lund, E. Pollman, The corporate governance machine, 121 Colum. L. Rev. 2563, Columbia Law Review, December, 2021.

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such consideration on the company itself.[282] Just as social and environmental factors may be material for an investor in the assessment of risks and returns,[283] and not merely collateral considerations or tiebreakers, they may now also be material from a corporate perspective. The decision not to amend the legal purpose of French companies contrasts with the more flexible positions of certain foreign laws, allowing for bylaw deviations from the traditional, default, company purpose, which can thus be modified up to varying degrees to provide for purposes other than profit, even if only partially, following the examples of English or Belgian laws.[284]

Similarly, contrasting with allegations heard during the debates, French case law and jurisprudence already largely favour a broad conception of a company's interest, not reducing it to maximising shareholder value. To our knowledge, no French judge has ever convicted a company director or manager for not maximizing shareholder value. The case law use of the notion of company's interest is essentially intended to sanction, in a more negative way, obvious infringements of the company's assets and profit-making capacity. In this sense, French law seems consonant with the American notion that directors "can manage with the interests of society and people in view when they believe that doing so is rationally related to shareholder value, as it generally will be."[285] There is little doubt that a widely-held, financially sound and economically dominant company has more room to manoeuvre in this respect than a company struggling to survive.[286]

Nonetheless, the reform certainly has the potential to solidify the managers' position vis-à-vis the shareholders. It opens avenues for companies and their managers, to do things, like pursuing social and environmental objectives that could have been legally disputable, particularly by their own shareholders. The reform thus facilitates resistance to pressure from short-term shareholders and even from shareholders at large. Hence the Minister of the Economy's presentation of the reform, explaining that it should be understood less as a constraint than a new freedom for companies. Some might view the amendment as the "lesser evil" among potential reforms, as it would only expose short-term oriented or excessively shareholder-focused managers to CSR shareholders' pressure. Since investors, especially institutional ones, take increasingly into account ESG factors and discipline managers to act in society's interests, either through legal

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[282] On the positive correlation between diligent sustainability business practices and economic performance, see e.g. G.L. Clark, A. Feiner and M. Viehs, From the Stockholder to the Stakeholder: How Sustainability Can Drive Financial Outperformance (5 March 2015), available at SSRN: https://ssrn.com/abstract=2508281 or http://dx.doi.org/10.2139/ssrn.2508281; G. Friede, T. Busch and A. Bassen, ESG and Financial Performance: Aggregated Evidence from More than 2000 Empirical Studies (22 October 22 2015). Journal of Sustainable Finance & Investment, Volume 5, Issue 4, p. 210-233, 2015, DOI: 10.1080/20430795.2015.1118917, available at SSRN: https://ssrn.com/abstract=2699610; T. Whelan, U. Atz, T. Van Holt and C. Clark, CFA, ESG and financial performance: Uncovering the Relationship by Aggregating Evidence from 1,000 Plus Studies Published between 2015 – 2020, Rockefeller asset management, NYU Stern Center for sustainable business, https://investesg.eu/2021/02/10/esg-and-financial-performance-uncovering-the-relationship-by-aggregating-evidence-from-1000-plus-studies-published-between-2015-2020/; The ESG premium: New perspectives on value and performance, McKinsey, Feb. 2020

[283] See the UN project "Fiduciary duty in the 21st century", final report, 2019; in the US, the DOL's proposed rule, published in October 2021, that would make it easier for ERISA plan fiduciaries to incorporate environmental, social, and governance (ESG) factors in their investment decisions, Federal Register / Vol. 86, No. 196 / Thursday, October 14, 2021, 57272.

[284] In Belgium, the 2019 company law provides that "*A company is formed by a legal act by which one or more persons, called partners, make a contribution. It has assets and liabilities and its purpose is to carry out one or more specific activities. One of its purposes is to distribute or procure for its partners a direct or indirect property benefit*." (Art. 1:1).

In the UK, according to the abovementioned Section 172: "*Where or to the extent that the purposes of the company consist of or include purposes other than the benefit of its members, subsection (1) has effect as if the reference to promoting the success of the company for the benefit of its members were to achieving those purposes*". The Better Business Act campaign suggests to amend it as follows: "*A company may specify in its Articles a purpose that is more beneficial to wider society and the environment than the purpose set out in subsection (2)*".

[285] E. Rock, For Whom Is the Corporation Managed in 2020?, *supra*; *adde*, L.E. Strine Jr., The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law, 50 Wake Forest L. Rev. 761, 783 (2015); M.C. Jensen, Value Maximization, Stakeholder Theory, and the Corporate Objective Function, 22 J. Applied Corp. Fin. 32, 36 (2010).

[286] See e.g., See C.D. Stone, Where the Law Ends, op. cit. p. 233 *sq.*; M.J. Roe, Corporate Purpose and Corporate Competition (July 13, 2021), ECGI - Law Working Paper No. 601/2021, Available at SSRN: https://ssrn.com/abstract=3817788 or http://dx.doi.org/10.2139/ssrn.3817788.

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requirements, competitive pressure or because of their own beliefs,[287] one may wonder whether this legislation will isolate managers from the traditional capital market discipline and give them more freedom to further their own interests. To be sure, regarding the incumbent management, the most cynical have understood the strategic use they could make of these new legal provisions against the company's shareholders in situations of value pluralism, as a means of building or reinforcing managerial entrenchment, which recalls the experience of the US constituency statutes passed in a timely manner to counter hostile takeovers in the 1980s.[288] This is all the truer that these social and environmental stakes can be particularly indeterminate and therefore perhaps prone to distortion and co-option, as the resolution of inevitable trade-offs could lead to greater discretion in managers and thus insulation from shareholders without corresponding direct accountability towards stakeholders,[289] or on the contrary, to undue pressures, in terms of time horizon or value creation, from particularly vocal stakeholders.[290] As the literature on behavioural ethics amply suggests, vagueness is an element that makes it easier for actors to justify behaviour in their own interest at the expense of others.[291]

44. This will depend significantly on the future judicial interpretation of the new requirement. On paper, the PACTE law only seems to introduce a minor requirement: taking into consideration social and environmental issues. This will mainly result in an obligation for managers to document *ex ante* how these issues were taken into consideration, beyond mere compliance with specific social and environmental legal requirements. One can anticipate that this consideration must be adapted to each company, in particular according to its size and activity. For example, the "carbon footprint" generated by the activity of an industrial company may be considered an environmental issue for the company. The ISO 26000 standard on CSR, launched in 2010, may serve as a reference.[292]

Beyond this formal constraint, which should not be underestimated since an ex ante documentation requirement, as an ex post disclosure requirement, may indirectly impact on corporate behaviour, and possibly on board composition and remuneration, there would be no particular substantive obligation. It will not by itself result in a company being prohibited from closing a plant, or a tobacco or alcohol manufacturer from pursuing its activity, or VTC companies being forced to pay their drivers better. The ultimate test will be whether, after considering the social and environmental issues, a company can still decide to sacrifice these issues in order to satisfy the interests of its shareholders or whether it is necessary, when a company has several options, to retain the one that minimizes negative externalities for the society and the environment. Rather provocatively, one could wonder whether it would be acceptable for the company managers to invoke the Friedmanian argument that it is precisely by making the maximum amount of lawful profit that the company can best act in consideration for

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[287] See D.S. Lund, Asset Managers as Regulators, 171 University of Pennsylvania Law Review (forthcoming 2022).

[288] In the United States, the low impact of constituency statutes is attributed to the fact that while they may enable corporate management to consider stakeholder interests, they do not mandate it and generally provide no enforcement mechanism, in contrast with French law.

[289] See L.A. Bebchuk, R. Tallarita, The Illusory Promise of Stakeholder Governance, Cornell Law Review, 106 (2020), 91. *Adde*, J.M. Karpoff, On a Stakeholder Model of Corporate Governance (December 8, 2020), Financial Management, European Corporate Governance Institute – Finance Working Paper No. 749/2021, https://ssrn.com/abstract=3642906.

[290] On the transformative power of Millennials, see M. Barzuza, Quinn Curtis & David Webber, The Millennial Corporation, *supra*.

[291] See M. E. Schweitzer & C. K. H, Stretching the Truth : Elastic Justification and Motivated Communication of Uncertain Information, Journal of Risk and Uncertainty, Vol.25, pp.199 (2002); Y. Feldman, A. Libson, and G. Parchomovsky, Corporate Law for Good People, Northwestern University Law Review, Vol.115, pp.1125, nbp.48 (2021).

[292] Study on due diligence requirements through the supply chain, EC, January 2020, p. 165: "The definition of due diligence of ISO 26000 is quite similar to the one of the UNGPs or the OCED Guidelines: [C]omprehensive, proactive process to identify the actual and potential negative social, environmental and economic impacts of an organization's decisions and activities over the entire life cycle of a project or organizational activity, with the aim of avoiding and mitigating negative impacts."

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the interests of the society or the environment, either directly or indirectly by facilitating the task of the public authorities in charge of these interests. It is indeed particularly disturbing, from a legal, political and philosophical point of view, to obligate a person to act, even partially, in the interest of the community or even in the interest of nature, when he has not agreed to do so and without precisely defining his obligations in this respect. This requirement may be said to contain an element contrary to the fundamental rights of a private person and even contrary, some may say, to human nature. Another interpretation, rather minimalist, could prevail, however, suggesting that it is in the best interest of the company and its shareholders, in the long run to take these social and environmental issues into consideration (hence, the above-mentioned replacement of the "*and*" by a comma).[293] The new requirement could thus be understood as a proxy or a test to check whether a particular decision is in the best long-term corporate interest, if the company has one. This perhaps merely restates the idea that "corporate welfare makes good sense if it makes good economic sense – and not infrequently it does".[294] It is true that some convergence of all those interests may exist in the long run and that potential conflicts or tensions between stakeholders can be reduced or eliminated through the common goal of long-term value creation. Such an absolute statement could nonetheless be excessive in many instances. The theoretical congruence may face challenges in practice. The interests of shareholders and stakeholders by definition can differ, even in the long run, and potential need for trade-offs of short- and long-term interests of shareholders and stakeholders are likely to be common.[295] Real life is not only made of win-win situations.

45. As the new requirement is not conceived as a consecration of a pluralistic stakeholder theory, the priority should remain the firm's profitability.[296] Consideration for the interests of stakeholders can continue to be conceived as having only an instrumental nature.[297] In other words, in cases where private and public interests are not clearly aligned, whether or not they are in direct conflict, the new provision should not by itself require the subordination of corporate profit and shareholder interests for the public good. To decide otherwise would be a total subversion of the current system of corporate governance.[298] Activities undertaken in the name of social responsibility are ultimately judged by their potential to generate value: if they do not create value or if they conflict with the maximization of shareholder wealth, they will be vulnerable to challenge. Paradoxically, the more literature and research dedicated to proving that CSR builds brand value and enhances profits, the more CSR becomes associated with a notion of advancing shareholder interests, which ultimately strengthens shareholder primacy's already strong grip on U.S. law and norms.[299]

46. Finally, even if the lack of consideration for social and environmental issues is not sanctioned by a specific regime of liability, the new text considerably increases the risk of controversy, dispute and litigation for vast numbers of French companies. This introduces a major

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[293] Over 2200 studies showing a positive relationship between ESG investment and returns – and around 90% showing at least a non-negative effect, see G. Friede, T. Busch and A. Bassen (2015), 'ESG and Financial Performance: Aggregated Evidence from more than 2000 Empirical Studies', Journal of Sustainable Finance & Investment, Vol. 5, Issue 4, pp. 210–233.

[294] T. Levitt, The Dangers of Social Responsibility, Harvard Business Review, 36, 41-50 (1958).

[295] L.A. Bebchuk, R. Tallarita, The Illusory Promise of Stakeholder Governance, Cornell Law Review, 106 (2020), 91.

[296] See V. Magnier, Y. Paclot, Le clair-obscur de la loi pacte : vers un nouveau paradigme de la gouvernance ?, Mélanges Alain Couret, éd. Lefebvre-Dalloz, 2020, p. 121; F.-X. Lucas, D. Poracchia, La prise en considération des enjeux sociaux et environnementaux de l'activité de la société, ibid., p. 89; M. Germain, Extension du domaine de la responsabilité des dirigeants : ambitions et réalités, Actes pratiques & ingénierie sociétaire - n° 175 - janvier-février 2021.

[297] See L.E. Strine Jr., The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law, 50 Wake Forest L. Rev. 761 (2015).

[298] See A. Karnani, The Case Against Corporate Social Responsibility, The Wall Street Journal, August 23, 2010.

[299] G. Berger-Walliser and I. Scott, Redefining Corporate Social Responsibility in an Era of Globalization and Regulatory Hardening, American Business Law Journal, Volume 55, Issue 1, 167–218, Spring 2018.

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change for small and medium enterprises (SMEs)[300], since CSR requirements have so far only concerned large companies. Case law (civil and criminal) is already developing in this area, for lack of risk prevention or false public statements about company practices (deceptive commercial practices). Contrary to English or American law, any interested person, under French law, has standing to sue a company for civil liability. In any event, such a wrongdoing may also constitute a just reason for dismissing the company managers.

As regards the neutralisation of the risk of nullification, several remarks can be made. Firstly, this is an implicit recognition of the mandatory nature of such a provision. Secondly, the scope of this absence of nullification may be criticised since it not only applies to the absence or insufficiency of the consideration for social and environmental issues, but also to the mere fact that managers have disregarded the interest of the company, which could lead to a reversal of the solution enshrined in French case law in the field of partnerships. Thirdly, the absence of nullity only concerns internal company decisions deemed ex post as not having complied with the new provision included in Article 1833, but not external actions, in particular agreements entered into with third parties.

Therefore, in terms of opportunity, this provision does not by itself sufficiently prevent judges from excessive interference in the management of companies. It is difficult, however, to see French judges, who are far from being business experts, interfering substantially in the way the managers of French companies should manage them. Some might be tempted, however. The first decision, dated 11 February 2021, which to our knowledge refers to the reform of Article 1833, articulates it in a revealing way with the duty of vigilance, stating that "*the development and implementation of the vigilance plan directly and significantly affect the business of the [company], and hence its management, by requiring it to: take action to mitigate or prevent risks that have been mapped out in advance and that have a direct impact on the [company's] strategic choices, which can no longer be made on the basis of a strict economic rationale, but rather by integrating elements previously considered to be exogenous; now managed, pursuant to Article 1833 of the Civil Code, "in its corporate interest, taking into consideration the social and environmental issues of its activity" (wording resulting from Law No. 2019-486 of 22 May 2019), it must integrate into its strategic orientations risks of human rights and environmental violations and, in fact, in view of the nature of its activity, proceed to substantial abandonments or reorientations*".[301] This could be an opportunity to develop a French-style "business judgment rule" to protect directors/managers from liability to stakeholders or ESG activists' for not going far enough in considering social and environmental issues and to traditional shareholders' for going too far in this direction.

Given their common inspiration and structure, French law will be less affected than others in the EU by the implementation of the **Corporate Sustainability Due Diligence Directive**, Article 25, whose stated aim is to "*clarify*"[302] the "*directors' duty of care*". This Article requires Member States to "*ensure that, when fulfilling their duty to act in the best interest of the company, directors of companies referred to in Article 2(1) take into account the consequences of their decisions for sustainability matters, including, where applicable, human rights, climate change and environmental consequences, including in the short, medium and long term*". We indeed find, on top of specific due diligence requirements, the same broad obligation, inspired by the CSR philosophy, to "*take into account*" social and environmental factors, although the obligation to "*take into consideration*" used in French law may be interpreted as somewhat

[300] A recent official report recommends "*drafting a best practice guide on how to take social and environmental issues into account in the decision-making process of corporate bodies for VSMEs and SMEs*": Rapport Rocher au Ministère de l'Économie, des Finances et de la Relance: Repenser la place des entreprises dans la société : bilan et perspectives deux ans après la loi Pacte, 19 oct. 2021.

[301] Tribunal judiciaire de Nanterre, Chambre, Ordonnance de mise en état, 11 février 2021, N° RG 20/00915, Association Notre Affaire à tous et alii c/ SA Total.

[302] Proposal, p. 22.

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weaker and less intrusive in the directors' decision-making process.[303] The UNGPs and OECD Guidelines are of little interpretative help here as they seem to use these terms, either objectively (issues) or subjectively (interests of stakeholders), without much rigour. Social and environmental factors are also considered in an inside-out perspective, but directors are only required to take them into account to the extent they consider them connected, and therefore material, to the interest of the company.[304] A contrary approach would have been legally vulnerable to a claim it would require directors to take action to benefit third parties of social and environmental policies at the expense of shareholders (and perhaps infringing their fundamental property rights).[305] A similar effort has obviously been made to avoid using stakeholder-oriented language, although the impact assessment appears less candid, stating that "[i]n order to comply with the general duty to act in the best interest of the company, directors should identify the company's key stakeholders and the interests of those stakeholders."[306] The impact assessment adds that "[d]irectors should establish a proper form for regularly engaging with stakeholders, i.e. employees' representatives and other major stakeholder groups (such as suppliers, other entities and local communities along the value chains) and relevant non-governmental organisations representing the interests of the environment, for example. Beyond the consultations related to adverse impact identification and mitigation as explained in the section on due diligence, engagement can take the form of establishing an advisory group, conducting regular consultations without establishing a formal structure for such consultations, including using existing consultation channels, such as for example with employees."[307] The reference to the "*best interest of the company*", and not that of the shareholders, as the main compass for the directors' decisions, despite being presented in an ancillary manner, may nevertheless constitute an innovation in certain Member States with respect to corporate forms – and even non-corporate forms in the realm of regulated financial undertakings.[308] As in French law, and in line with the provisions on due diligence, the proposal favours a company per company – rather than a group – approach.

The Directive proposal is simply more explicit regarding the object of this obligation in terms of elements, i.e. "*consequences*"[309] – rather than "*stakes*" – of the directors' decisions for "*sustainability matters*", a generic and objective expression, already present in the NFRD,[310] that covers human rights, climate change and other environmental consequences, in a seemingly non-exhaustive way, and in terms of time horizons. In this regard, the consideration for the short- and medium terms[311] represents a welcome improvement, which contrasts with the exclusive focus for the long term in the European Commission preparatory work.

47. More novel, however, is the choice of an approach based on, and the express reference to – at least in the title of the article – the "*duty of care*" of directors, which borrows from the Anglo-Saxon tradition and the well-known Delaware triad of fiduciary duties (loyalty, care and good faith) it imposes on company directors. Although this breakdown is less explicit in continental

[303] See *supra*, n° 34.

[304] The construction of the text is also comparable to the famous (Section 172(1)) of the UK companies act on the "*Duty to promote the success of the company*", which states that « *A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to…*". It contrasts with more externally-focused proposals, see e.g., J. Winter, Addressing the Crisis of the Modern Corporation: The Duty of Societal Responsibility of the Board, SSRN: https://ssrn.com/abstract=3574681.

[305] See Response to the Proposal for a Directive on Corporate Sustainability Due Diligence by Nordic and Baltic Company Law Scholars, art. prec.

[306] Annex 13. *Adde*, the CSRD proposal, requiring the description of "*how the undertaking's business model and strategy take account of the interests of the undertaking's stakeholders*".

[307] *Ibid.*

[308] See Company Laws of the EU. A Handbook, Beck, Hart, Nomos, 2020; Corporate boards in law and practices, Oxford, 2013.

[309] This is in line with the European Commission's redefinition of CSR in its aforementioned 2011 Green Paper, as "the responsibility of enterprises for their impacts on society".

[310] It is noteworthy that the CS3D does not include the subjective expression "*take account of the interests of the undertaking's stakeholders*", also used in the NFRD.

[311] A use of these time horizons is already referred to in the European Commission Guidelines on non-financial reporting: Supplement on reporting climate-related information, 2019/C 209/01.

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Europe,[312] failure to fulfil a duty of care is undoubtedly one of the most common illustrations of mismanagement ("*faute de gestion*") or violation of the company's interest, and its highlighting could contribute to a certain clarification on this point. Ironically, the expression "duty of care", initially used to designate in English the French duty of vigilance, is often translated in French as a "duty of *diligence*", which may create confusion rather than clarification. Perhaps for this reason, the French version of the proposed Directive prefers to refer to a "*devoir de sollicitude*", a concept imported from public law but unfortunately so far devoid of specific meaning in company law. The fact that the word "solicitude" is usually defined as an "anxious" care for somebody's comfort, health or happiness" raises additional doubts about the relevance of this transposition and the risk of confusion between the ethics of empathy and private law.

Where this duty of care is already recognised, in Germany for instance,[313] it is in principle, however, exclusively directed towards the company and intended to prevent the damage that the company might suffer as a result of its directors' behaviour.[314] As often explained, "this fiduciary duty is owed by directors and officers to the corporation, not the corporation's stakeholders or broader society".[315] A reconciliation with the positive law of most Member States ultimately depends on the degree of autonomy given to directors in exercising this duty to take into account the consequences of their decisions for sustainability matters, i.e. the degree to which it is subservient to the company self-interest, without leading to an infinite extension of the latter to forcibly integrate all sorts of external factors. It should be kept in mind that the resounding Hague District Court judgment of 26 May 2021 ordering the Shell Group to limit its annual volume of all CO2 emissions into the atmosphere (Scope 1, 2 and 3) in line with the objectives of the Paris Agreement, was only based on its interpretation of an unwritten tort law general standard of care laid down in Book 6 Section 162 Dutch Civil Code. Furthermore, the question will arise as to the admissibility under national law of a derivative legal action brought by a shareholder, who may have become one opportunistically, against the company directors.[316]

48. Moreover, contrary to the French Article 1833, the personal scope of this duty of care is limited to the "*directors*" – mainly understood as any members of the administrative, management or supervisory bodies[317] – of large EU companies. The exclusion of non-European companies is a recognition that the definition of directors' fiduciary duties is core national *lex societatis*. Interestingly, the specific obligation to establish a plan to ensure that the business model and strategy of the company are compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5°C in line with the Paris Agreement, which still appeared in a very recent version of the proposal in the article devoted to the duty of care, has been moved to a stand-alone article. This change has made it possible to extend its application to non-European companies. It leads, however, to a disturbing application of the provisions on the directors' variable remuneration linked to their contribution to the company's business strategy and long-term interests and sustainability, to non-EU companies, notwithstanding this issue may

[312] See Company Laws of the EU. A Handbook, Beck, Hart, Nomos, 2020; Corporate boards in law and practices, Oxford, 2013.

[313] "A director has to act with the care of an orderly and conscientious business manager", see Alexander Schall in Company Laws of the EU. A Handbook, Beck, Hart, Nomos, 2020, p. 271.

[314] See G. Wagner, Officers' and Directors' Liability Under German Law — A Potemkin Village, Theoretical Inquiries in Law 16.1 (2015), vol. 16:69.

[315] https://www.law.cornell.edu/wex/duty_of_care.

[316] See the ClientEarth's decision to take derivate legal action against Shell's Board for failing to adopt and implement a climate strategy that truly aligns with the Paris Agreement goal to keep global temperature rises to below 1.5°C by 2050, ClientEarth release, 15 March 2022.

[317] See Proposal, Art. 3(o): "any member of the administrative, management or supervisory bodies of a company; (ii) where they are not members of the administrative, management or supervisory bodies of a company, the chief executive officer and, if such function exists in a company, the deputy chief executive officer; (iii) other persons who perform functions similar to those performed under point (i) or (ii)".

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be seen as a pure company law matter, already covered for listed European companies by the shareholder rights directive. *Prima facie*, the obligation to take this contribution into account in setting variable remuneration is formulated in such an indirect and conditional – although unclear – manner that it does not appear to represent a significant burden for companies. It is not impossible to imagine, however, that a less literal reading could be applied or that the conditions set out might come from shareholder pressure, exercised in private or public forms through "say on pay" or "say on climate" mechanisms.[318]

49. The fact that Article 25 shares some basic common points with its French counterpart logically risks attracting to it the types of criticisms to which the French version may in theory be subject, particularly regarding its imprecision and uncertainty, which seem to be inconsistent with the alleged clarification aim and could fuel disputes and litigation on the part of companies, to whom directors generally owe their duties, or of ESG-oriented shareholders and, more worryingly, stakeholders in Member States whose company law gives them legal standing to sue. Yet, this has not been a significant problem in France since the 2019 reform. One may nonetheless wonder how these new broadly defined obligations would fit in national company laws recognising business judgement rules.[319]

50. The comparative advantage of the European provision is that, contrary to French law, it establishes a direct connection between the personal scopes of application of the duty of care and the due diligence requirements, which will both apply to the largest European companies, where the duty of diligence appears as a particular and enhanced implementation of the duty of care. If this connection may introduce a double duty of care standard according to the size of companies, for the largest ones, it will help to reduce the risks that directors' exercise of their duty of care after taking due diligence measures in accordance with the Directive will be challenged successfully. It is further reinforced by the obligation, set out in Article 26(2), for directors "*to take steps to adapt the corporate strategy to take into account the actual and potential adverse impacts identified*" and "*any due diligence measures*" accordingly adopted. Some, as the Regulatory scrutiny board itself,[320] may therefore call into question the necessity and added value to regulate directors' duties on top of due diligence requirements. At least in the field of human rights and the environment, the general duty of care would only have a residual application. The articulation of the duty of care and the duty of diligence may be different, however, if one considers that the duty of care is centred on the protection of the company's interest and the duties of diligence on that of third parties and the environment, which may therefore lead to potential cumulative applications in particular if the harm caused to third parties generate adverse consequences, especially reputational, for the company itself. Unfortunately, the European text is silent on procedural rules, despite their practical importance in terms of directors' liability, and in particular on the availability of private rights of action under these provisions, which we know are more easily distributed in French company law, whether for shareholders or affected third parties, than in some other national laws. If certain national laws do not recognise private rights of action to shareholders and third parties in this context, which would be consistent with the construction of this duty of care in the (Anglo-Saxon) countries that have developed it, recognition of rights elsewhere is likely. In French law, for example, the wording of Article 1833, which places the obligation to take social and environmental factors into consideration on the

[318] For a criticism from an agency standpoint, see E. Lidman, The role of corporate governance in sustainability and why the Commission's CS3D proposal might do more harm than good, OBLB, 27 April 2022.

[319] See for instance the German business judgment rule, which reads as follows: "*There is no breach of duty, if the director, when taking a managerial decision, could reasonably assume to have acted, on the basis of appropriate information, for the benefit of the company*" (§ 93 I 2 AktG).

[320] SEC(2022) 95, 26.11.2021.

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company, and not its directors, helps to open a company up to claims in a private right of action from shareholders or third parties having allegedly suffered personally and distinctly from a breach of this legal obligation through a management decision taken by any corporate body. The question is whether Article 25, as drafted, will allow the opening of such claims to others than the company itself, which could act *ut universi* or *ut singuli*, and if so, whether the position which establishes the company as a compulsory debtor vis-à-vis third parties can be maintained or whether, on the contrary, it will impose the possibility of personal liability on the directors in any event, which would lead to a particular deactivation in France and the Member States familiar with such construction, the theory of "separable fault" in civil liability actions brought by third parties.[321] Recital 63 of the proposal, recalling that the duty of care is owed "*to the company*", should limit the risks of an expansive interpretation of the requirement thus laid down, and leave Member States the choice of opening up actions for director's liability to shareholders or to third parties.

51. A disadvantage specific to such a general European provision on directors' duties of care is that the interpretation leeway inherently left to national judges, in addition to the fact that the sanctions of the violation of these duties will remain governed by national rules, constitutes a threat to the very objective of the Directive, namely the harmonisation of corporate laws and conduct within the European Union. One cannot help noticing that while the Directive proposal provides for the drafting of guidelines and accompanying measures in its diligence section, nothing of the sort is planned for the duty of care section.

52. As in French law, uncertainty remains, from a normative point of view, as to the usefulness of such a provision, which is bound to be controversial, as early commentators have repeatedly pointed out.[322] In both cases, a serious impact assessment would have given these provisions a more robust research foundation by integrating the extensive legal and financial literature questioning the need for legislative reform to induce directors to take into consideration social and environmental factors while discharging their duty to act in the interest of their companies,[323] the impact of the law, rather than culture and character, on directors' preferences,[324] the effectiveness of civil liability as a managerial disciplinary tool,[325] the unintended negative effects of increasing directors' civil liability,[326] and how best to induce directors to invest optimally in

[321] Under this theory, third parties must demonstrate that the wrongful act or negligence was separable from the directors' functions (i.e. wilful misconduct that is particularly serious and incompatible with the normal exercise of their duties), A. Pietrancosta, P.-H. Dubois and R. Garçon, in Company Laws of the EU. A Handbook, Beck, Hart, Nomos, 2020; Corporate boards in law and practices, Oxford, 2013.

[322] See the conference organised by ECGI on 29 March 2022.

[323] See A.N. Licht, R.B. Adams, Shareholders and Stakeholders around the World: The Role of Values, Culture, and Law in Directors' Decisions, Law Fin Working Paper, No. 13, Goethe University, Center for Advanced Studies on the Foundations of Law and Finance (LawFin), Frankfurt a. M., Dec. 2021, http://dx.doi.org/10.2139/ssrn.3766934.

[324] See A.N. Licht, R.B. Adams, op. cit.

[325] See e.g., H. Spamann, Monetary Liability for Breach of the Duty of Care? (September 1, 2015). Journal of Legal Analysis, Vol. 8, No. 2 (Winter 2016), Harvard Law School John M. Olin Center Discussion Paper No. 835, European Corporate Governance Institute (ECGI) - Law Working Paper No. 300/2015, Available at SSRN: https://ssrn.com/abstract=2657231 or http://dx.doi.org/10.2139/ssrn.2657231.

[326] See *inter alia*, S. Lakshmi Naaraayanan and Kasper Meisner Nielsen, Does Personal Liability Deter Individuals from Serving as Independent Directors? (December 17, 2020), Journal of Financial Economics (JFE), Forthcoming, Available at SSRN: https://ssrn.com/abstract=3466102 or http://dx.doi.org/10.2139/ssrn.3466102; R. Masulis, S. Shen and H. Zou, 2020, Personal Liability and Board Quality, Hong Kong University working paper; Y. Guan, L. Zhang, L. Zheng, H. Zou, Managerial liability and corporate innovation: Evidence from a legal shock, Journal of Corporate Finance 69 (2021) 102022; S. Choi and H. Jung, Effects of the litigation risk coverage on corporate social responsibility, Applied Economics Letters, Volume 28, 2021 - Issue 21; B. Van Rooij and M. Brownlee, Does Tort Deter? Inconclusive empirical evidence about the effect of liability in preventing harmful behaviour, in B. Van Rooij & D. D. Sokol (Eds.), Cambridge Handbook on Compliance. Cambridge, UK: Cambridge University Press, 2021.

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compliance. It is rare that a defective manufacturing process produces quality products. This also seems to be true of legislative value chains…

B. THE TWO NEW OPTIONAL FRENCH LAW PROVISIONS ENHANCING CSR: "*RAISON D'ÊTRE*" AND "*SOCIÉTÉ À MISSION*"

53. Unlike various mandatory requirements of French corporate law, provisions relating to these two new concepts are of a permissive, or enabling nature. This nature is in fact directly correlated to the content of these concepts. Contrary to the due diligence duties previously examined, consisting in the establishment of intermediary obligations dedicated to a duty to refrain from causing harm, the two new possibilities offered to French companies by the PACTE rest in the realm of a "morality of aspiration", rather than a "morality of duties", known to be more difficult to impose and enforce.[327]

1. THE ADOPTION OF A "*RAISON D'ÊTRE*"

54. Firstly, the company bylaws may define a "*raison d'être*" – a company's fundamental reason for being (Article 1835, modified by Article 169 of the PACTE law).[328] There was a time when there was little doubt about a company's *raison d'être*: it was about making a profit for its shareholders. In order words, for a company, *having* was a good enough reason, if not the ultimate one, for *being*. A goal of business (and the essence of free enterprise) is to produce "sustained high-level profits", i.e. "to go after profit in any way that is consistent with its own survival as an economic system."[329] Our era is reviving a conception of the relationship between business and society under which this philosophy appears to be rather provocative.[330] Such conception of business has become for many either utterly inappropriate or at least insufficient.[331] It is no longer about "striving to be the best company in the world but the best company for the world". The notion, in vogue 100 years ago, that corporations have a soul and cannot be reduced to money-making machines is reinvigorated. As noted in the preparatory work for the reform,[332] the government intention was to encourage French companies to give meaning to their collective

[327] See C.D. Stone, Where the Law Ends, op. cit. p. 101.

[328] See A. Couret, Faut-il réécrire les articles 1833 et 1835 du Code civil ?, D. 2017, p. 222; A. Viandier, La raison d'être d'une société (C. civ. art. 1835), BRDA 10/19 inf. 30; P.-Y. Bérard, L'intérêt social et la raison d'être des sociétés », Rev. Banque, 2018/9, n° 823, p. 83; I. Urbain-Parleani, La raison d'être des sociétés dans le projet de loi PACTE du 19 juin 2018, Revue des sociétés 2018 p. 623 and Revue des sociétés 2019, p. 575; D. Poracchia, De l'intérêt social à la raison d'être, Bull. Joly Sociétés, juin 2019, p. 40; A. Pietrancosta, "Intérêt social" and "raison d'être": Thoughts about two core provisions of the Business Growth and Transformation Action Plan (PACTE) Act that amend corporate law, Annales des Mines - Réalités industrielles, Nov. 2019, p. 55; V. Lafarge-Sarkozy, Raison d'être. - Loi Pacte et « raison d'être » : une réforme nullement symbolique, La Semaine Juridique Edition Générale n° 46, 11 novembre 2019, doctr. 1174; Loi Pacte et raison d'être, ORSE, 2020; D. Autissier, L. Bretones, E. Jacquillat, T. Sibieude, Entreprises à mission et raison d'être - Changer l'entreprise pour un monde plus durable, Dunod, 2020; B. Valiorgue, Raison d'être de l'entreprise, Coll. L'opportune, 2020; N. Rouvet Lazare, La raison d'être des entreprises. Deux ans après, premier bilan, Fondation Jean Jaurès, mars 2021; Se doter d'une raison d'être, devenir une société à mission. Guide pratique à destination des dirigeantes et des dirigeants des PME-ETI, Bpifrance, 2021; A. Menais, Raison d'être, responsabilité et engagement. L'entreprise au-delà du capitalisme, LexisNexis, 2021.

[329] See T. Levitt, The Dangers of Social Responsibility, Harvard Business Review, 36, 41-50 (1958), and later, M. Friedman, The Social Responsibility of Business is to Increase its Profit, The New York Times Magazine, September 13, 1970.

[330] Leading entrepreneurs have long insisted on the importance of a company purpose: see the eloquent statement of Henry Ford: "Business must be run at a profit, else it will die. But when anyone tries to run a business solely for profit, then also the business must die, for it no longer has a reason for existence."

[331] V. D. Henderson, Misguided Virtue. False Notions of Corporate Social Responsibility, The Institute of Economic Affairs, 2001, using the expression critically, p. 79.

[332] N. Notat et J.-D. Senard, « L'entreprise, objet d'intérêt collectif – Rapport aux Ministres de la Transition écologique et solidaire, de la Justice, de l'Economie et des Finances, et du Travail », 9 mars 2018.

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purpose,[333] to express "a desirable future"[334], to pursue "a search for coherence"[335], to "give substance" to the mere legal fictions that they constitute"[336]. The *raison d'être* has been described as "a guide for important decisions",[337] "for determining strategic orientations",[338] "the identity and vocation of the company",[339] "an ambition that the company's founders propose to pursue",[340] "a purpose, an ambition, or any other general consideration relating to the affirmation of its values or long-term concerns",[341] "a kind of subjective cause of the company".[342]

55. Despite the initial invitation of the Council of State to clarify its content and scope,[343] the notion of *raison d'être* remains legally unclear. The legislature only indicated that this *raison d'être* is "*made of the principles that the company has adopted and for the respect of which it intends to allocate resources in the realization of its activity*".

We have perhaps entered an era of "narrative companies". The "*petites sociétés*" are called upon to become part of the "*grande societé*", to reflect on their positive contributions and to justify in global terms their societal usefulness, beyond their mere material component, in terms of the adequacy of their values and operating methods in relation to political correctness of the time. Companies are invited to verify that their private egosystems are compatible with the general ecosystem, through an exercise of introspection, if not psychoanalysis, in order to determine elevated reasons for their existence: not just what they do, which belong to the classical realm of the notion of corporate object, but how and why they do what they do. This quest for a *raison d'être* is a quest for meaning, values and identity, which amounts to finding and sharing the reasons why a company exists, the immutable attributes that define it, regardless of the course of history. The approach is undoubtedly more philosophical than legal, based on the priority of meaning over norms and the faith in the fruitfulness of existential doubt. By its complexity, the *raison d'être* is or at least can be, to take up the Aristotelian categorisation of causality, a formal and a final cause, as well as an efficient one since a true reason for being is also a reason for acting. In contrast to a narrow vision of CSR, focused on the avoidance of negative externalities, the definition of a raison d'être invites a proactive conception of a company's beneficial role in society, although the law itself does not expressly state, as it does in relation to the definition of the company interest or the mission-driven companies, an obligation to link the *raison d'être* to specific social or environmental considerations or objectives.

56. For the time being, companies should first wonder whether to embrace this legal UFO and endow themselves with a *raison d'être*: in a way, determine the *raison d'être* of their *raison d'être*. In practice, a range of situations can arise making the *raison d'être* a fair and true commitment to a higher vision, a corporate superego; in others, a mere hostage statement.[344] It is also important to design an adequate procedure for drawing up the *raison d'être,* on which the law remains silent, but which should logically involve the main company's stakeholders.

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[333] Report, p. 6.

[334] Report, p. 42.

[335] Report, p. 49.

[336] Report, p. 49-50.

[337] Report, p. 4.

[338] Report, p. 6.

[339] Impact study, p. 545.

[340] Impact study, p. 547.

[341] Conseil d'État, Avis 14-6-2018, p. 39 n° 105.

[342] Ass. Nat., Report no. 1237 in Volume 2 p. 106.

[343] Conseil d'État, Avis 14-6-2018, n° 95, p. 37.

[344] See, characterising the 2019 Business Roundtable statement on the purpose of a corporation, M. Barzuza, Quinn Curtis & David Webber, The Millennial Corporation, *supra*.

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Prominent French companies have certainly taken up the issue, which is now omnipresent in the economic news. A number of illustrations can be given:[345]

- At Atos (leader in digital transformation), the first major company to have included a *raison d'être* in its bylaws, the general meeting of 30 April 2019 defined it as follows: "*At Atos, our mission is to contribute to shaping the information space. With our skills and services, we support the development of knowledge, education and research in a multicultural approach and contribute to the development of scientific and technological excellence. All over the world, we enable our customers and employees, and more generally the largest number of people, to live, work and progress sustainably and confidently in the information space*" (Balo 22-3-2019 p. 14);

- At Veolia Environnement, the *raison d'être* is "*to contribute to human progress, by firmly adhering to the Sustainable Development Goals defined by the United Nations, in order to achieve a better and more sustainable future for all. It is with this in mind that Veolia's mission is to "Resourcing the world" by providing environmental services*";

- At Carrefour, which placed it in the preamble of its bylaws: "*to offer our customers quality services, products and food that are accessible to all through all distribution channels. Thanks to the skills of our employees, our responsible and multicultural approach, our roots in the regions and our ability to adapt to production and consumption patterns, our ambition is to be the leader in the food transition for all.*";

- At Michelin: "*to offer everyone a better way forward*";

- At Danone: "*to give pleasure back to food by constantly innovating; to generate superior, sustainable and profitable growth*";

- At Crédit Agricole: "*to act every day in the interest of our customers and society"*;

- At Société Générale: "*to build a better and sustainable future together with our customers by providing responsible and innovative financial solutions*";

- At Camif: "*to offer products or services for the home that are designed to benefit people and the planet*";

- At MAIF: "*Convinced that only sincere attention to each other and to the world can guarantee a real better togetherness, we place it at the heart of each of our commitments and each of our actions. It is our raison d'être*";

- At the new SA SNCF (state-owned railway company), which succeeds the public establishment SNCF Mobilités on the 1st of January 2020: "*to provide everyone with the freedom to travel easily while preserving the planet*";[346]

- At Icade: "*To design, build, manage and invest in cities, neighbourhoods and buildings that are innovative, mixed-use, inclusive, connected and low carbon. Places where it is good to live, live and work. That is our ambition, that is our goal. That is our raison d'être.*";

- At ENGIE: "*to act to accelerate the transition to a carbon-neutral economy through more energy-efficient and environmentally friendly solutions. This raison d'être brings together the company, its employees, customers and shareholders and reconciles economic performance with a positive impact on people and the planet. ENGIE's action is appreciated in its entirety and in the long term.*";

- At Orange: "*Orange is the trusted player that gives everyone the keys to a responsible digital world*";

- At Wordline: "*We design and operate digital payment and transaction services to contribute to sustainable economic growth and strengthen trust and security in our societies. We make them environmentally friendly, accessible to the greatest number of people, while accompanying societal transformations*";

[345] See Comité de suivi et d'évaluation de la loi PACTE. Premier rapport. Annexes, sept. 2020, p. 76; Second rapport, Sept. 2021, Annexes, p. 213.

[346] See décr. n° 2019-1585, 30 déc. 2019, JO 1er janv. 2020.

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- At Aéroports de Paris: "*Welcoming passengers, operating and designing airports, responsibly and worldwide*";

- At EDF (Électricité de France): "*Building a CO2-neutral energy future that reconciles preservation of the planet, well-being and development through electricity and innovative solutions and services*".

- At Eramet: "*To become a reference in the responsible transformation of the earth's mineral resources, for the good of all.*";

- At Nexity: "*Living together*";

- At Française des Jeux: "*Gambling is our business, contribution to society our driving force and responsibility our requirement*.";

- At Soitec: "*We are the breeding ground for smart, energy-efficient technologies that are making a lasting difference to our daily lives*.";

- At TotalEnergies: "*help bring more affordable, available and cleaner energy to more people*".

Interest in the notion is indeed high among large, listed companies. In March 2020, a study estimated that 55% of CAC 40 companies had a *raison d'être*, 64% of which had adopted one as a result of the PACTE law.[347] According to this study, 54.5% of the formulations are "factual", i.e. focused on the valuation of the company's activity, and 27.3% are "pragmatic" because they emphasize performance, and only 18.2% are "aspirational". In 2022, another study[348] indicates that nearly 60% of SBF120 companies and 80% of CAC40 companies declare a formalized *raison d'être*.[349] The managers of large companies clearly show interest: according to a poll, for more than 80% of them, a powerful *raison d'être* improves employee satisfaction, company resilience and customer loyalty. The link between a firm's visibility in its market and the level of CSR has been documented in numerous empirical studies.[350] As such, CSR can be a strategic policy aimed at preventing contestability and protecting the long-term interests of a firm.[351] Interestingly, in the Veolia / Suez takeover battle, the Suez board's invocation of a breach of Suez's *raison d'être* to reject Veolia's takeover bid in February 2021 has reopened the debate on the use of *raison d'être* as an anti-takeover weapon.[352] Companies may also find themselves under increasing pressure related to *raison d'être* matters, from stakeholders: customers-citizens, employees (current and potential (new generations)), investors, regulators (that business leaders try to pre-empt). Such pressure can also come from engaged shareholders.[353] In France, the State in its shareholder capacity also plays a role, as evidenced in a Minister of the Economy 2019 statement that companies in which the State is a significant shareholder should have a *raison d'être*, and that the Public Investment Bank (BPI) should take the same approach with the companies in which it invests", which concerns around 90 companies. Interestingly, a survey of employees in large companies shows that 41% of them have never heard of the company's *raison d'être* and

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[347] Les entreprises du CAC 40 à l'âge de la raison d'être, Comfluence, mars 2020.

[348] WeMean, Raisons d'être & Société à mission : où en est le SBF120 ?, https://www.wemean.com/livre-blanc-raison-etre-entreprise-sbf120/#:~:text=WEMEAN%20a%20r%C3%A9alis%C3%A9%20une%20%C3%A9tude,Paris%20ayant%20adopt%C3%A9%20ces%20dispositifs.

[349] *Adde*, H. Segain, Laurence Vincent, Gouvernance des sociétés cotées : guide pratique sur l'intégration des enjeux de responsabilité sociétale et environnementale (RSE), Herbert Smith Freehills, 4 mars 2022, p. 48.

[350] See J.D. Margolis and J.P. Walsh, People and Profits? The Search for a Link between a Company's Social and Financial Performance, Psychology Press, 2001.

[351] See T. Hommel, O. Godard, Contestation sociale et stratégies de développement industriel. Application du modèle de la Gestion Contestable à la production industrielle d'OGM. Working paper, Ecole Polytechnique 15, 2001.

[352] See A. Gaudemet, La raison d'être, nouvelle défense anti-OPA ?, Bull. Joly Soc., 1/2019, n° 1, p. 1; F. Alogna, Raison d'être - La raison d'être, nouveau moyen de défense anti-OPA ?, Revue de Droit bancaire et financier n° 5, sept. 2021, dossier 22.

[353] See S. Martin-Gousset, La raison d'être des sociétés cotées : une aubaine pour les actionnaires activistes ?, Bull. Joly sociétés, oct. 2020, p. 49. *Adde*, the emphasis on the company purpose in Larry Fink's 2019 Letter to CEOs, viewed as a « *company's fundamental reason for being* ».

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40% have heard of it but do not know exactly what it is all about. A 2020 poll confirmed that 94% of the managers questioned said they were in favour of having a *raison d'être,* yet 69% of employees consider it to be primarily a communication matter.[354] Despite their real or professed interest, few business leaders favour a requirement of a mandatory *raison d'être*.

57. Even if it is understandable, from a management viewpoint, that a *raison d'être* may be conceived as a strategic asset, from the outside, the whole exercise may sometimes look like an ongoing contest of virtues and a catalogue of good intentions. While for many companies it corresponds to a deep and sincere reflection, others may appear to use it merely as a "virtue signal", the line between the two categories of companies being sometimes difficult to draw with certainty. Yet, "in economics and evolutionary biology, where the idea of a signal has grown up, a good signal must be expensive – otherwise it can be easily falsified".[355] We know that, according to the credible commitment theory, informal constraints are vital to facilitating credible commitments. So, is this more than a PR, cosmetic or rhetorical exercise? What are the legal consequences of these general statements?

58. Firstly, the *raison d'être* should not be seen as a purpose competing with the one, enshrined in law, for which the company was formed – to make a profit. It should be considered as a description of how the company intends to behave in order to achieve that legal purpose or an enlightened realisation of that purpose through the company's ambition for its place and role in the community, thus serving a differentiation function, like any externalised corporate purpose, helping the selective adherence of stakeholders.[356] There are, however, legal consequences flowing from the introduction of a *raison d'être* in the bylaws.

Obviously, the definition of a *raison d'être* in the bylaws must be consistent with, and enable the company and its governance, to operate within the allocation of powers as defined by law. The way in which the *raisons d'être* are currently drafted and the known limits of case law regarding the arrangement of powers among corporate bodies provide some flexibility in this respect. Even if this practice has not yet developed among engaged investors, it might be conceivable, for instance, to include a general objective of carbon neutrality among the elements of the *raison d'être*. More specific objectives would be more appropriate in a company with a *mission*.

When a *raison d'être* has been defined in the bylaws of a stock corporation, the PACTE law specifies that the board of directors is required, in performing its duties, to take the company's *raison d'être* into consideration.[357] It therefore creates a duty for the *board of directors* to explain and document how this consideration was carried out.

Likewise, the law requires the corporation to allocate resources for the fulfilment of the purpose. Disturbingly, companies never seem to disclose about the resources they intend to allocate to compliance with their *raison d'être*. A permanent monitoring mechanism should therefore be established.

Surprisingly, there is no neutralization here of the nullification risk of internal company decisions in case of violation of the company' *raison d'être*.

Beyond corporations and directors, it should also be kept in mind that all company managers are potentially liable towards the company and the shareholders for any violation of the bylaws, if the violation has caused harm. Towards third parties, it is the company, and not the managers

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354 Raison d'être, comment éviter le coup de com, Les Échos, 10 fév. 2020. *Adde*, Comité de suivi et d'évaluation de la loi PACTE. Second rapport. Annexes, Sept. 2021, p. 213.

355 The Economist, 24 Aug. 2019.

356 On the instrumental function of corporate purpose, rather than a regulatory instrument to promote specific public policies, see J.E. Fisch and S. Davidoff Solomon, Should Corporations Have a Purpose?, 1309 Texas Law Review (2021).

357 C. com., Art. L. 225-35.

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themselves (*faute non separable*), that could be held civilly liable, as a matter of law. The extent of this risk depends on the language used in the *raison d'être*, in particular whether it is worded as a statement of fact, commitment, or undertaking, and not simply as an aspirational statement. As the *raison d'être* is defined at the ultimate parent company level on behalf of the whole group, this may result in piercing the corporate veil in some circumstances or at least in holding the mother company liable for the subs' activities where it can be shown that the mother company exercised certain levels of oversight, direction or control over its subs which led to the liability. The directors of the subs may be found liable for failing to perform their directors' duties where it is shown they simply followed the instructions of their shareholder without appropriately considering the best interests of the subs and their stakeholders.

Also, in the case of companies offering their securities to the public, there is the risk of an administrative or criminal sanction for misleading information, if a transaction – capital increase, issuance of debt securities – is presented as intended to contribute to the achievement of the company's *raison d'être*, whereas the purpose pursued with the fundraising is unrelated to that purpose.[358]

Some of these legal consequences, which may increase in the future,[359] perhaps explain why most French companies have so far preferred expressing their *raison d'être* outside their bylaws. To our knowledge, only 5 CAC40 and 14 SBF120 companies (Engie, Orange, Wordline, ADP, Atos, EDF, Eramet, Nexity, Soitec, Carrefour, CNP Assurances, FDJ, GTT and Icade) have decided to introduce a *raison d'être* in their bylaws; the last five of them, only in the preamble of their bylaws.

Finally, non-legal consequences should not be disregarded. We may see executive compensation incorporate parameters related to the *raison d'être*. We may also witness "purpose-washing" practices being attacked by the ESG investment world and activist short sellers.

2. THE LABEL "*SOCIÉTÉ À MISSION*"

59. The PACTE law created a new label, called "*société à mission*" ("mission-driven company"), with similar structure to a normal business company.[360] Any such company may publicly opt for this new label if it satisfies the following five conditions:

1° It has a *raison d'être* defined in its bylaws;

2° Its bylaws include a mission, i.e. social and environmental objectives in accordance with its *raison d'être*. Here we find the triple bottom line – people, planet and profit – that characterises the structure of the US benefit corporation. The definition of the *raison d'être* is in turn constrained by a social and environmental orientation.

3° Its bylaws specify the procedures for monitoring the performance of this mission. These procedures provide that a mission committee,[361] separate from the corporate legal bodies and having at least one employee, is exclusively responsible for this monitoring and submits an annual

[358] Comp. Cass. com. 20-9-2017 No. 15-29.098 and 15-29.144: BRDA 20/17 inf. 7.

[359] A recent official report recommends that "companies with a *raison d'être* in their bylaws report once a year to their shareholders on the contribution of the strategy implemented and the results corresponding to the *raison d'être*"; and to "make a fraction of the variable compensation (minimum target of 20%) of employees and company directors conditional on objective extra-financial criteria linked to the *raison d'être*.": Rapport Rocher au Ministère de l'Économie, des Finances et de la Relance: Repenser la place des entreprises dans la société : bilan et perspectives deux ans après la loi Pacte, 19 oct. 2021.

[360] See R. Mortier, La société à mission en France et dans le monde, Journ. des sociétés, avril 2019, n° 72, p. 17; D. Autissier, L. Bretones, E. Jacquillat, T. Sibieude, Entreprises à mission et raison d'être - Changer l'entreprise pour un monde plus durable, Dunod, 2020; E. Cohen, La société à mission, Hermann, 2019; B. Teyssié, Les sociétés à mission, La semaine du droit - édition générale - n° 17 - 26 avril 2021; La société à mission: Perspectives critiques sur l'entreprise sous l'angle de la loi PACTE, sous la direction de Fleur Laronze, Presses universitaires de Strasbourg, 2021; Se doter d'une raison d'être, devenir une société à mission. Guide pratique à destination des dirigeantes et des dirigeants des PME-ETI, Bpifrance, 2021.

[361] Or a "mission representative" in small companies, see Code of Commerce, Art. L. 210-12.

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report attached to the management report, to the meeting responsible for approving the company's accounts. This committee would carry out any audit it deems appropriate and be provided with any documents necessary to monitor the performance of the mission;

4° The execution of the social and environmental objectives is subject to verification by an independent third-party body, according to procedures and publicity defined by decree in the Council of State.[362] This verification would give rise to an opinion attached to the report referred to in 3°;

5° The company declares its mission company character to the clerk of the commercial court, who publishes it.

If one of these conditions is not met or if, in the opinion of the independent third-party body, one or more of the company's social and environmental objectives have not been met, the public prosecutor or any interested person may refer the matter to the President of the Court ruling in summary proceedings to delete mention of the terms "mission company" from all acts, documents or electronic media from the company.[363]

Unfortunately, contrary to the US benefit corporation,[364] there is no presumption nor guarantee in the law that directors and managers of a *société à mission* will be reputed acting in the company interest while pursuing the company's mission. This presumption was taken out before the Senate, on the ground that it could lead to abuses.

60. The French insurer MAIF is the first large company to announce its intention to become a *société à mission*. Some other major companies have taken the plunge: Yves Rocher, Crédit Mutuel Alliance Fédérale, La Poste, La Banque Postale or Danone. For the moment, the use of this label is still relatively marginal. Although it is progressing, we have not seen, as a 2021 report to the Ministry of the Economy emphasises,[365] a major shift on the part of companies, particularly the largest. Among the SBF120 companies, only one has a "mission" label. Of all the listed companies, four have a mission. In total, by September 2021, there were about 300 *sociétés à mission*, which represents more than a quadrupling in one year,[366] out of the millions in our country. 70% of them are companies with fewer than 50 employees, relatively young, largely Parisian and operating in the service sector. 13% of them are also B Corp certified. What is perhaps surprising is the level of ignorance of CSR and *sociétés à mission*, despite the media coverage. A survey last June of 600 companies showed that 58% of managers had never heard of CSR and only 15% knew exactly what it was. Beyond education, which should take precedence over reform, many entrepreneurs point out that the benefits of this label of *sociétés à mission* were not perceptible while the risks (legal, reputational) are identified. Half of managers believe that the adoption of this label is primarily for PR or display reason and that the control methods do not guarantee the desired specific or concrete actions.

True to its guiding ambition,[367] the French government nevertheless intends to promote this legal status on a European scale...[368]

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[362] See Décret n° 2020-1 du 2 janvier 2020 relatif aux sociétés à mission.

[363] C. com. art. L 210-11.

[364] See e.g., in Delaware: DEL. CODE ANN. tit. 8, § 365(b).

[365] Rapport Rocher au Ministère de l'Économie, des Finances et de la Relance: Repenser la place des entreprises dans la société : bilan et perspectives deux ans après la loi Pacte, 19 oct. 2021. See A. Pietrancosta, Option Finance n° 1628 - 2 novembre 2021, p. 7.

[366] Comité de suivi et d'évaluation de la loi PACTE. Second rapport. Annexes, Sept. 2021, p. 213.

[367] See the Parliamentary bill "*to promote the social, solidarity-based and responsible economy in rural areas*", No. 4459, of 21 June 2021, which proposes to do so by extending the scope and specifying the provisions of the PACTE law.

[368] See La France défend la création du statut de société à mission au niveau européen, Novethic, 20 octobre 2021.

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ANNEXES

1. DUTY OF VIGILANCE

Code of Commerce, Art. L. 225-102-4

I. – Any company that at the end of two consecutive financial years employs at least five thousand employees within the company and its direct and indirect subsidiaries, whose head office is located on French territory, or that has at least ten thousand employees in its service and in its direct or indirect subsidiaries, whose head office is located on French territory or abroad, must establish and implement an effective vigilance plan.

The subsidiaries or controlled companies that exceed the thresholds mentioned in the first paragraph are deemed to satisfy the obligations laid down in this Article from the moment that the company which controls them, within the meaning of Article L. 233-3, establishes and implements a vigilance plan for the company's operations, as well as the operations of all the subsidiaries or companies that it controls.

The plan shall include the reasonable vigilance measures to allow for risk identification and for the prevention of severe violations of human rights and fundamental freedoms, serious bodily injury or environmental damage or health risks resulting directly or indirectly from the operations of the company and of the companies it controls within the meaning of Article L.233-16, II, as well as from the operations of the subcontractors or suppliers with whom it maintains an established commercial relationship, when such operations derive from this relationship.

For companies producing or marketing products from agriculture or forestry, this plan includes, in particular, reasonable vigilance measures to identify risks and prevent deforestation associated with the production and transport to France of imported goods and services.

An order shall define the categories of companies mentioned in the fourth paragraph of this I.

The plan shall be drafted in association with the company stakeholders involved, and where appropriate, within multiparty initiatives that exist in the subsidiaries or at territorial level. It shall include the following measures:

1° A mapping that identifies, analyses and ranks risks;

2° Procedures to regularly assess, in accordance with the risk mapping, the situation of subsidiaries, subcontractors or suppliers with whom the company maintains an established commercial relationship;

3° Appropriate action to mitigate risks or prevent serious violations;

4° An alert mechanism that collects reporting of existing or actual risks, developed in working partnership with the trade union organizations representatives of the company concerned;

5°A monitoring scheme to follow up on the measures implemented and assess their efficiency.

The vigilance plan and its effective implementation report shall be publicly disclosed and included in the report mentioned in Article L. 225-102.

A Council of State decree can add to the vigilance measures laid down in 1° to 5° of this Article. It can specify the modalities for elaborating and implementing the vigilance plan, within multiparty initiatives that exist in the subsidiaries or at territorial level where appropriate.

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II. – When a company does not meet its obligations in a three-month period after receiving formal notice to comply with the duties laid down in I, the relevant jurisdiction can, following the request of any person with legitimate interest in this regard, urge said company, under financial compulsion if appropriate, to comply with its duties.

An application may be made to the president of the court, ruling in interlocutory proceedings, for the same purpose.

[Provisions declared non-compliant with the Constitution by Constitutional Council decision no. 2017-750 DC of 23 March 2017: The judge can sentence the company to pay a civil fine of 10 million euros or less. The judge shall base the amount of this fine on the seriousness of the negligence, the circumstances in which it was committed, and the personality of its author. This fine is not deductible from taxable income.]

Code of Commerce, Art. L. 225-102-5

According to the conditions laid down in Articles 1240 and 1241 of the Civil Code, the author of any failure to comply with the duties specified in Article L. 225-102-4 of this code shall be liable and obliged to compensate for the harm that due diligence would have permitted to avoid.

[Provisions declared non-compliant with the Constitution by Constitutional Council decision no. 2017-750 DC of 23 March 2017: In which case, the amount of the fine as laid down in Article L. 225-102-4, II can be augmented up to three times, depending on the seriousness and the circumstances of the negligence and the damage caused.]

The action to establish liability shall be filed before the relevant jurisdiction by any person with a legitimate interest to do so.

The court may order the publication, distribution or display of its decision or an extract thereof, in accordance with its procedures. The costs shall be paid by the person convicted.

The court may order its decision to be carried out under financial compulsion.

2. COMPANY INTEREST AND *RAISON D'ÊTRE*

Civil Code. Article 1833

A company must have a lawful object and be established in the common interest of the partners.

The company is managed in its corporate interest, taking into consideration the social and environmental stakes linked to its business.

Civil Code, Article 1835

The articles of association must be drawn up in writing. They shall determine, in addition to the contributions of each shareholder, the form, object, name, registered office, share capital, duration of the company and the manner of its operation. The Articles of Association may specify a raison d'être, consisting of the principles which the company sets out to uphold and for which it intends to allocate resources in order to carry out its activity.

Code of Commerce, Article L. 225-35

The Board of Directors determines the orientations of the company's activity and ensures their implementation, in accordance with its corporate interest, considering the social,

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environmental, cultural and sporting stakes linked to its business. It shall also take into consideration, where appropriate, the raison d'être of the company as defined in accordance with Article 1835 of the Civil Code.

3. SOCIÉTÉ À MISSION

Code of Commerce, Art. L. 210-10

A company may publicly state that it is a *société à mission* if the following conditions are met

1° its articles specify a purpose, within the meaning of Article 1835 of the Civil Code;

2° Its articles of association specify one or more social and environmental objectives which the company has set itself to pursue in the course of its business;

3° Its articles of association shall specify the procedures for monitoring the execution of the mission mentioned in point 2. These procedures shall provide that a mission committee, which is distinct from the corporate bodies provided for in this book and which must include at least one employee, shall be exclusively responsible for such monitoring and shall present an annual report, attached to the management report mentioned in Article L. 232-1 of this code, to the meeting responsible for approving the company's accounts. This committee shall carry out any verification it deems appropriate and shall be provided with any document necessary to monitor the execution of the assignment;

4° The implementation of the social and environmental objectives mentioned in 2° shall be verified by an independent third-party organisation, in accordance with the procedures and publicity defined by decree in the Conseil d'État. This verification shall give rise to an opinion attached to the report mentioned in point 3;

5° The company shall declare its status as a *société à mission* to the clerk of the commercial court, who shall publish it, subject to the compliance of its articles of association with the conditions mentioned in 1° to 3°, in the register of commerce and companies, under conditions specified by decree of the Council of State.

Code of Commerce, Art. L. 210-11

When one of the conditions mentioned in Article L. 210-10 is not complied with, or when the opinion of the independent third-party body concludes that one or more of the social and environmental objectives that the company has set itself pursuant to 2o of the same Article L. 210-10 are not complied with, the public prosecutor or any interested person may refer the matter to the president of the court ruling in summary proceedings for the purpose of enjoining, if necessary under penalty, the legal representative of the company to remove the words "*société à mission*" from all acts, documents or electronic media issued by the company.

Code of Commerce, Art. L. 210-12

A company which employs during the financial year fewer than fifty permanent employees and whose articles of association meet the conditions set out in Articles 1 and 2 of Article L. 210-10 may provide in its articles of association that a mission representative shall replace the mission committee referred to in Article 3 of the same Article L. 210-10. The project manager may be an employee of the company, provided that his employment contract corresponds to an actual job.

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