

5. A French Approach to the Company's Interest in the Context of Sustainability

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The aim of this contribution is to assess company interest in relation to sustainability in French law, a concept that has long been a source of interest for French jurists. Changes in society and the economy make this a constantly-evolving concept, which is exciting for company law specialists. The proposed approach is also marked by reflections focused on ethics and norms that are central to the *École d'Orléans*.¹

In France, company interest has been a fundamental issue of company law since the *Cour de cassation* recognized the legal personality of companies in an 1891 decision,² which distinguished the company as a legal entity distinct from its the shareholders. This distinction was made in various European countries around the same time, perhaps most notably is the UK's 1897 *Salomon's Case*.³ What is interesting to note regarding the French case that distinguished the company as distinct from its shareholders is that it goes beyond the legal texts. Indeed, the *Civil Code* of the time did not contain any provision on legal personality. This can be explained by the Revolutionaries' distrust of intermediary bodies (such as corporations, for example) that formed a barrier between the State and citizens. In the 1891 decision, the judges considered that "it is of the essence of civil companies, as well as commercial companies, to create, for the benefit of the collective individuality, interests and rights that are specific and distinct from the interests and rights of each of its members". This solution is therefore a creation of judges who base the solution on what

1 The *École d'Orléans* is known in the French-speaking academic world for its work on norms and their evolution. Among the emblematic books, we can mention the *trilogy* led by Professor Catherine Thibierge: *La force normative – Naissance d'un concept*, LGDJ/Bruylant, 2009; *La densification normative – Découverte d'un processus*, mare & martin, 2014; *La garantie normative – Exploration d'une notion-fonction*, mare & martin, 2021.

2 Req. 23 février 1891, *DP* 1891. I. 337, S. 1892. I. 73, note E. Meynial.

3 *Salomon v. A Salomon & Co Ltd* [1897], AC 22. The development of a company's interest in the United Kingdom is analysed in detail by Andreas Rühmkorf in this volume.

they consider to be the reality of the situation and who extend a solution that existed for commercial companies. As we can see, this extension is based on the idea that a company has an interest distinct from that of its shareholders.

Legal personality of the company distinct from its shareholders has been further provided for in more modern law. In 1966, Section 1832 was added to the Civil Code, which, in its latest adopted version from 1978, specifies that the company is both a contract and an institution. A company's legal personality beings when it registers in the Trade and Companies Register, but the company's interest is still not defined by law. The PACTE Law of 2019 simply specified, in a new paragraph 2 of Section 1833 of the Civil Code, that "[t]he company is managed in its company's interest, taking into consideration the social and environmental issues of its activity." Thus, the law states how the directors and the judge must assess a company's interest, but it does not say what the company's interest *is*. This is what French law calls a "concept with variable content"; in other words, it is deliberately vague, leaving it up to the actors of company law (or the judge) to specify the interest on a case-by-case basis.

Determining the company's interest is important because reference to the company's interest is found in many provisions in French law: for example, abuse of voting rights (the abuse of majority, minority, or equality), where the shareholder uses their voting rights to vote in a way that is contrary to the company's interest and with the aim of harming the other partners, or in the civil charge for mismanagement (when the director takes a decision contrary to the company's interest), regardless of whether the company is *in bonis* or under insolvency law. Beyond that, reference to the company's interest is also found in criminal law, specifically in the offence of misuse of company assets, which consists, for a director of a commercial company, in knowingly using the company's assets, credit, or powers for personal purposes.

The dichotomy between the lack of a precise definition provided in law and the importance of defining company interest in many laws has been mobilizing French doctrine for more than a century. The development of the sustainability context⁴ has reshuffled the cards and brought about other discussions. Some date the appearance of corporate social responsibility (CSR) in corporate law to the 2002 Earth Summit in Johannesburg. However, going back further, it must be noted that, in international law, the

4 See the contribution of Beate Sjaafjell in this book.

Global Compact was mentioned as early as 1999 by the Secretary-General of the United Nations, and was subsequently put into practice in 2000. The aim of the Global Compact was to promote the values of the United Nations by inviting companies to adopt, support, and apply those values in their sphere of influence.

CSR is one of the ways that sustainable development for companies is handled. It addresses the three pillars of sustainable development: the environment, the economy, and social issues. More specifically, in 2002, the European Commission⁵ defined CSR 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". Since 2011, it has been accepted that CSR is no longer necessarily a voluntary approach but rather can be seen as a mandatory standard.⁶ To that extent, it can be noted that, beyond the question of the company's interest, French doctrine has shown that certain legal tools (in civil law⁷, consumer law⁸ or financial law⁹) make it possible to transform responsibility into liability. In case law, the key example is the Erika case, which held oil company Total liable for failing to comply with their voluntary commitment to CSR on the basis of non-compliance with a voluntary commitment.¹⁰ This finding is strengthened by a since-adopted law that provides for the duty of vigilance. The adoption of a law on the duty of vigilance now strengthens the legal

5 EU Communication, *Corporate Social Responsibility: A Business Contribution to Sustainable Development*, COM (2002) 347 final, 2 July 2002, p. 5.

6 See EC Communication "A New EU Strategy for 2011–2014 for Corporate Social Responsibility", 25 October 2011, COM (2011) 681 final.

7 See M. Mekki, « Le contrat, vecteur du devoir de vigilance », Dossier spécial RSE et devoir de vigilance, *Revue Lamy Droit des affaires*, mai 2015.

8 See G. Goffaux Callebaut, « La consommation responsable », in *Les enjeux de la réforme du droit de la consommation*, Actes du colloque du 27 mars 2014, LPA 27 juin 2014, p. 15 et seqq.; N. Sauphanor-Brouillaud, « Le consommateur », in *Le droit économique, levier de la transition écologique*, in A.-S. Epstein et M. Nioche (dir.), *Larcier / Strada Lex*, 2022, p. 137 et seqq.; P. Lequet, « Droit de la consommation durable : entre éthique environnementale et éthique des affaires », in J. Sohnle et C. Bouriau (dir.), *Éthique environnementale pour juristes*, mare & martin, 2024.

9 G. Goffaux Callebaut, « Densification et "dédensification" normatives en droit des sociétés », in *La densification normative – Naissance d'un processus*, *op. cit.*, p. 797 et seqq., et « Garantie normative et responsabilité sociale des entreprises », in *La garantie normative*, *op. cit.*, p. 369 et seqq.

10 In this case, the questions were raised in both civil and criminal matters. Crim. 25 septembre 2012, n° 10–82.938, Bull. crim. n° 198.

arsenal. French law thus contains enforcement for sustainability tools, excluding a company's interest.

The link between a company's interest and CSR is best presented in two parts. First, this chapter will explain how the notion of company interest has mobilized doctrine and case law following the major company law of 1966 (A). Second, it will address more recent developments in CSR and how those developments have made it possible to revisit the definition of company interest (B).

A. The Evolution of the Notion of Company Interest in the Twentieth Century

The evolution of the notion of the company interest in the twentieth century will be considered, focusing on the latter part of the twentieth century, beginning with the 1966 Law which set the framework for modern company law in France. First, the evolution of company interest in the context of this law will be examined (I), and then the more specific context of the 1990s, which saw a significant liberal turn, will be looked at (II).

I. Company Interest in the Context of the 1966 Law

To better understand the evolution of company interest, we will first examine the doctrinal context of company interest (1) and then follow with the jurisprudential context (2).

1. The Doctrinal Context

The 1966 Law only mentions the notion of company interest in certain corporate policing tools, e.g. in the sanction for misuse of company assets, and thus is quite vague. In view of this vagueness, company interest has been widely discussed in order to determine its real ideology. These discussions are reflected in three major doctrinal currents.¹¹

In the 1960s, the Ecole de Rennes defined company interest as “l'intérêt de l'*entreprise*”, the interest of the *business*, which combines the different

11 For further details, refer to G. Goffaux Callebaut, « La définition de l'intérêt social », *RTDcom.* 2004, p. 35 et seqq.

interests involved. This meaning corresponded to the functionalist proposition of the 'company' as the legal *garment* of the business. Thus, the *business's* interest had to encompass not only the interest of the shareholders, but also that of the creditors, employees, and main partners of the company. This definition has been widely criticized in that "it makes the interest of the shareholders a component that is too negligible of the company's interest". However, this theory is relevant now, almost 60 years later, as it underpins the stakeholder theory by considering both employees and communities. However, given the era in which it was adopted, the 1966 law does not mention the environmental issues.

A more liberal doctrinal current suggests that a company's interest must be understood as the common interest of the shareholders of the company, which includes the sharing of company amongst shareholders. This vision of *shareholder primacy* is based on Section 1833 paragraph 1 of the Civil Code, which provides that "every company must [...] be constituted in the common interest of the shareholders". But this approach has also been criticised, first because the text refers to the *constitution* of the company and not its management, and second because it neglects the fact that the company must exist long-term.

Thus, a third understanding of a company's interest has emerged: it must ensure "an effective compromise between the real selfish or altruistic interests involved".¹² It must also be "a harmonious temporal synthesis of the interests of the members and that of the company".¹³ Defined in this way, company interest is a compromise, a middle way.

2. The Case Law Context

The case law from 1960–2000 has also not provided much detail on the definition of a company's interest. Judges remained very pragmatic in their decisions and did not try to define company interest. However, there is one consistent thread in these judgments: company interest lies in the fact that it is destined to exist and to develop. This consensus results from situations where the directors or shareholders of a company committed acts that went against the company's interest, which led to the risk that

12 Y. Chaput, *Droit des sociétés*, PUF 1993, n° 717, p. 319.

13 J.-P. Bertrel, « Liberté contractuelle et sociétés », *RTD com.* 1996.595., spec. n° 52, p. 626.

the company would disappear.¹⁴ This is the case, for example, if a majority of the shareholders of a company would decide to allow one shareholder to use the company's only asset, like a building, as collateral. In such an example, if the property were seized, the company would no longer have any assets or activities, and it would thus be dissolved.

It should be noted here that French law does not expressly recognize the Business Judgement Rule. However, judges do not sanction managers consistently across their decisions; the sanctions will vary depending on how serious the manager's misconduct is. Mismanagement, as a flexible concept, allows judges this discretion. Accordingly, the courts regularly grant a "right to make mistakes" to managers. In addition, as specified clearly in a law passed on 9 December 2016, insolvency law provides that simple negligence does not justify a director being liable for insufficient assets.¹⁵ This makes it possible to integrate the Business Judgement Rule into French law.

A notable exception in case law should be mentioned: the *Fruehauf* judgment of 1965.¹⁶ In this decision, the Paris Court of Appeal ruled that in order to define company interest, it was necessary to take into account not only the interests of the shareholders but also the interests of all persons who derive income or resources from the company's activity (including employees, suppliers, and subcontractors). The Ecole de Rennes relies on this decision to justify its position that company interest is defined as the interest of the *business*, but it should be noted that the *Fruehauf* decision did not come from the Cour de cassation, nor was it repeated.

By the end of the twentieth century, authors began to wonder whether legislative developments had made it possible to finally reconsider the definition of company interest.

14 See A. Vézinet, « La position des juges sur l'intérêt social », *Droit et patrimoine* avril 1997, p. 50 et seqq.

15 C.com., art. L. 651-2.

16 Paris 22 mai 1965, *JCP* 1965.II.14274 *bis*, concl. Nepveu; *RTD com.* 1965.619, obs. R. Rodière; *Rev. sociétés* 1965.288, *D.* 1968.147 and *Chron.* 45 (R. Contin, « L'arrêt *Fruehauf* et l'évolution du droit des sociétés »).

II. The Company's Interest and Laws of the Last Decade of the 20th Century

In France, the last decade of the 20th century saw the emergence of two major phenomena: the introduction of governance codes (1) and the creation of a company form marked by pronounced contractual freedom (2).

1. The introduction of governance codes

The 1990s were a period of important reflection for corporate governance issues. Like the Cadbury Committee in UK, France also tasked various commissions with reflecting on best practices. In 1995, the Viénot I Report noted that there was too great a concentration of power in favour of directors. The report insisted on the need for better information for shareholders, a more efficient organisation of boards, and strengthened checks and balances. Other proposals were then made by a Marini Report in 1996, and by a second Viénot Report in 1999. The reflections provided in all three reports were then integrated into the French governance codes. For example, the Afep-Medef Code, which is the reference code for large, listed companies,¹⁷ refers to the "intérêt social de l'entreprise". This expression is surprising for the French jurist because it does not refer to any of the three doctrinal currents mentioned above, and it is questionable whether this adds any nuance to the definition of company interest. Curiously, the English translation only mentions the *company's interest*. The same can be said for the Middlednext Code, which is aimed at SMEs.¹⁸ Thus, the governance codes did not directly specify what interest must be considered, but in this context, it is clear that the shareholders have a central place in the operation of the companies. Shareholders' interest, as providers of capital, was central to governance, even if these codes recognize the existence of other checks and balances.

17 https://afep.com/wp-content/uploads/2022/12/Afep_Medef_Code_revision_2022_version_EN_.pdf [last accessed Dec. 28 2024].

18 https://middlednext.com/IMG/pdf/code_middlednext_2021_-_version_en.pdf [last accessed Dec. 28 2024].

2. The creation of a contractual company

France also instituted a new type of company at the end of the 20th century: the simplified joint stock company (la société par actions simplifiée), which offered shareholders contractual collaboration.¹⁹ In the articles of association of simplified joint stock companies, the partners are released from a number of public order rules that typically apply to the organisation of management or to the voting rules. This organizational structure allows the company to adapt to the needs of the shareholders.²⁰ However, the legislator has not addressed how the definition of company interest applies in this new type of company where the will of the shareholders is central.

Accordingly, the question has arisen as to whether the definition of company interest is possibly evolving towards a greater consideration of the interest of shareholders. However, the legislator has not taken this path, nor has the case law been modified, and the criteria for defining company interest has not changed. Thus, at the end of the 20th century, what appeared was a dual function of company interest, either as compass for directors and shareholders, or as an instrument for policing companies. This dual approach seems to be verified, or even reinforced, in the context of the development of sustainability.

B. The Evolution of the Notion of Company Interest in the Context of Sustainability

In France, the 2001 law on new economic regulations²¹ took up some of the recommendations of the aforementioned reports. But soon, commentators noted that the French approach was slightly different from the Anglo-American approach, and there was talk of "French-style corporate governance". The French approach was undoubtedly European, as the European Action Plan for *Modernising Company Law and Enhancing Corporate Governance* of 2003 contained the same ideas. The European Action Plan focused

19 Loi n° 1994-1 du 4 janvier 1994 instituant la société par actions simplifiée, modified by Loi n° 1999-587 du 12 juillet 1999 sur l'innovation et la recherche which has further relaxed the rules for the incorporation of the SAS.

20 G. Goffaux Callebaut, *Du contrat en droit des sociétés – Essai sur le contrat instrument d'adaptation du droit des sociétés*, préf. J.-P. Gastaud, L'Harmattan, coll. Presses universitaires de Sceaux, 2008, spec. n° 136 et seqq.

21 Loi n° 2001-420 du 15 mai 2001 relative aux nouvelles régulations économiques.

not only on governance, and therefore by extension on directors and shareholders, but also on other checks and balances (in particular, from employees and consumers).²² This demonstrates the first seeds of the shift from corporate governance to corporate social responsibility, and thus of the introduction of sustainability to company law.

In French law, CSR dates from the 2001 law on new economic regulations. More recently, in 2018, French law was impacted by a report on *The company, object of collective interest*,²³ which was partially adopted in the PACTE Law of 2019.²⁴ The general idea of the report, and the succeeding law, provides context to company law, freeing companies from having short-term profitability as their sole goal, and thus allowing companies to aim for sustainability.²⁵ In other words, even if the company does aim to make a profit, under the new regulation, it may also integrate other longer-term concerns into its strategy.

So how, considering the updated laws on CSR, has company interest changed? To answer this question, it is necessary to return to the conclusion of the first part, namely that company interest is both a compass for directors and shareholders (I) and an instrument for policing companies (II). It is from this dual point of view that conclusions will be drawn on the new contours of company interest.

22 See, in particular, G. Goffaux, « Le plan d'action de la Communauté européenne en droit des sociétés – Une approche française », *Bull. Joly Sociétés* 2003, § 213, p. 997 et seqq.

23 For further details, refer to: https://minefi.hosting.augure.com/Augure_Minefi/r/ContenuEnLigne/Download?id=FAA5CFBA-6EF5-4FDF-82D8-B46443BDB61B&filename=entreprise_objet_interet_collectif.pdf [last accessed Dec. 28 2024].

24 Loi n° 2019-486 du 22 mai 2019 relative à la croissance et à la transformation des entreprises (Law on the growth and transformation of companies, known as the PACTE Law).

25 The company is indeed intended to make profits, but its purpose also allows it to aim for another (sustainable) goal.

I. Company Interest Considered as a Compass for Directors and Shareholders

First, company interest serves as a compass²⁶ for company policy, which CSR necessarily has an impact on. The focus on ethics, social issues, and the environment is a general movement that affects the life of companies. Thus, the governance of companies is influenced by new values. In French law, this involves soft law instruments (1) and hard law instruments (2).

1. The Influence of Sustainability via Soft Law Instruments

The influence of CSR values on company interest is achieved through various soft law instruments.

First, corporate codes of ethics reflect the importance of CSR considerations. Today, many companies have adopted a code of ethics. These codes contain values, principles, and rules that guide directors in their obligations and influence their liabilities. Among the values put forward, there is systematic reference to protection of the environment, working conditions, or the interest of stakeholders.²⁷ In addition, these concerns are indirectly integrated by reference to international texts such as the United Nations Global Compact²⁸ or the OECD Guidelines for Multinational Enterprises.²⁹ Although a company's code of ethics is not a legally binding standard before court, it does serve a mandatory obligation internally. Thus, in court, "the code of ethics may [...] be used by the judge to measure behaviour

26 A. Pirovano, « La boussole de l'intérêt social – Intérêt commun, intérêt social, intérêt de l'entreprise? », *D.* 1997. chron. 189. See also M. Cozian, A. Viandier and F. Deboissy, *Droit des sociétés*, LexisNexis, coll. Manuel, 2017, 30^{ème} éd., n° 555.

27 IDEP study on the codes of ethics of CAC 40 companies, supra. See the article by G. Gaède, « Panorama des sources d'inspiration des codes d'éthique », in *Les codes d'éthique – Prémices d'une gouvernance d'entreprise transnationale*, *Cahiers de droit de l'entreprise*, n° 4, juillet-août 2014, n° 20.

28 Known as *Global Compact*. See: <https://pactemondial.org/> [last accessed Dec. 28 2024].

29 *OECD Guidelines for Multinational Enterprises* 2011. For a general view, refer to : M. Doucin, « La dimension internationale de la responsabilité sociale de l'entreprise », in L. Fonbaustier et V. Magnier (dir.), *Développement durable et entreprise*, Dalloz, coll. Thèmes et commentaires, 2013, p. 15 et seqq.

and give concrete expression to the assessment of a standard".³⁰ In addition, these values are sometimes reinforced such that they achieve the status of real norms and thus become binding on managers and employees.

In this way, companies integrate CSR considerations into the guidelines that directors must follow. Indeed, these *a priori* non-binding codes do in fact bind directors in the sense that their management must be in line with the concerns recognized by the entire company.

Second, management measurement tools now account for ethics as well. This illustrates the rise of CSR principles in the directions given to managers. Such management tools include the standardisation processes,³¹ certifications, labelling, and ratings, and tend to incorporate sustainable values. These tools allow companies to specify their priorities, and, in practice, companies particularly emphasize social and environmental concerns, which again shows that the direction that companies set for themselves is indeed influenced by CSR issues. Among these tools is the ISO 26000 Social Responsibility standard³² which focuses on the rights of stakeholders, the rights of employees, and human rights. As a tool without any binding force, the ISO 26000 standard is optional and lacks certification. The ISO 26000 works by providing recommendations that companies can choose from based on what they find appropriate.³³ However, being able to choose priorities makes it possible for companies adopt the steps taken in the

30 P. Deumier, « Appliquer, expliquer ou sanctionner? », in Dossier *Les codes d'éthique – Prémices d'une gouvernance d'entreprise transnationale*, *Cahiers de droit de l'entreprise*, juillet 2014, n° 25, p. 37–38.

31 "Standardisation is an activity of general interest which aims to provide reference documents developed by consensus by all interested parties, relating to rules, characteristics, recommendations or examples of good practice, relating to products, services, methods, processes or organisations". Décret n° 2009–697 du 16 juin 2009 sur la standardisation, Art. 1^{er} paragraphe 1. Paragraph 2 of this text adds that standardisation "aims to encourage economic development and innovation while taking into account sustainable development goals".

32 This standard was created in 2010 following a largely participatory process, with 436 experts and 195 observers from 94 ISO member countries and 42 international organizations. V. C. Ruwet, « ISO 26000 : vers une démocratisation de la procédure ISO? », in M. Capron, F. Quairel-Lanoizelée, M.-F. Turcotte (dir.), *ISO 26 000 : une norme « hors norme »? Vers une conception mondiale de la responsabilité sociétale*, Economica, coll. Recherche en Gestion, 2011, p. 69 et seqq.

33 Ph. Rozec, « La norme ISO 26000 : un nouveau souffle pour la responsabilité sociale des entreprises », *JCP S* n° 51, 21 décembre 2010, 1548.

societal and environmental fields.³⁴ Accordingly, company policy must also reflect these advancements.

In addition, labelling and rating incentives contribute to the way companies define their CSR objectives. The display of the labels or ratings obtained for CSR purposes reflects the commitment of companies to integrate ethics into their policies.

In addition to these global tools, there are two specific French tools (though similar instruments can be found in other jurisdictions) that were created by the PACTE Law of 2019.

The first is the *raison d'être* integrated into Section 1835 of the French Civil Code: "the articles of association may specify a *raison d'être*, consisting of the principles with which the company adopts itself and for the respect of which it intends to allocate resources in the performance of its activity". This is also incorporated into the law of public limited companies, in Section L. 225-35 of the French Commercial Code. *Raison d'être* should not be confused with corporate purpose, which is the program of activity that the company sets for itself and which, in turn, sets out the bounds of the company's legal capacity. In concrete terms, the *raison d'être* must allow the company to devote part of its human and financial resources to goals other than making a profit. In practice, many companies confuse *raison d'être* with an advertising slogan.

Since the implementation of the PACTE Law, shareholders can also decide to go further in the process and choose a specific status as a 'company with a mission'. This is not a new corporate form, but rather a type of label. In addition to choosing a *raison d'être*, companies 'with a mission' must also set social and environmental objectives and set up a monitoring committee to report on the procedures the company is implementing to achieve these objectives. These reports are subject to review by an independent third-party body. In the event of non-compliance with its commitments, the company may lose its 'company with a mission' label.³⁵

Thus, these soft law tools, while not mandatory, do allow companies to specify how CSR issues are taken into account in their company policy, and

34 See, in particular, F. Laronze, « La norme ISO 26000, une source de droit en matière sociale? L'apport de la théorie du droit à la réflexion sur les normes RSO », *Droit social* 2013, p. 345 et seq. However, since 2013, AFNOR has been offering, in support of the ISO 26000 standard, reference documents that offer methodological recommendations that make it possible to "objectify and demonstrate the relevance of the actions implemented".

35 C.com., art. L. 210-12.

consequently to specify how the company sees its own interest internally. Hard law tools also participate in this function.

2. The Influence of Sustainability via Hard Law Instruments

The influence of CSR on company interest also involves two hard law tools: non-financial reporting³⁶ and the duty of vigilance of parent companies through their subsidiaries.³⁷ Both tools are mandatory for some companies but are voluntary for others. Each tool has specific features.

French law has included an obligation to *report* on social and environmental matters since the 2001 law on new economic regulations. The Grenelle II Law of 2010 reinforced this system. For listed companies, the management report must include "information on the way in which the company takes into account the social and environmental consequences of its activity as well as on its societal commitments in favour of sustainable development and in favour of the fight against discrimination and the promotion of diversity".³⁸ The data that must be provided is specified by

36 See B. Petit, « « Reporting » RSE : un nouveau coup d'épée dans l'eau... », *Environnement*, Juillet 2014, étude 12; B. Rolland, « Le reporting social, sociétal et environnemental : regards critiques », *Bull. Joly Sociétés* 2014, p. 287 et seqq.; C. Malecki, « L'irrésistible montée en puissance de la RSE », *Bull. Joly Sociétés* 2013, p. 594 et seqq.

37 See P. Abadie and G. Goffaux Callebaut, « La responsabilité basée sur l'existence d'un risqué particulier », in *Dossier Responsabilité dans les groupes de sociétés, Actes pratiques et ingénierie sociétale*, mai-juin 2017, p. 16 et seqq.

38 Art. 225-102-1, al. 5 C.com. The same type of obligation also exists in European law since the implementation of the Directive of 22 October 2014. Directive 2014/95/EU of 22 October 2014 amending Directive 2013/34/EU with regard to disclosure of non-financial and diversity information by certain large undertakings and groups. See C. Malecki, « Publication de la directive RSE ou comment faire confiance à la gouvernance d'entreprise durable », *Bull. Joly Sociétés*, déc. 2014, p. 732 et seqq.; B. Petit, art. above; B. Rolland, art. above; C. Malecki, « L'irrésistible montée en puissance de la RSE », art. above; I. Tchoutourian, « Divulgence extra-financière des sociétés en Europe : Présentation et analyse du projet de la Commission européenne », *RTDeur.* 2014, p. 309 et seqq. *It makes* it mandatory to publish information on their environmental and company impacts, respect for human rights, and the fight against corruption, as well as on diversity policy in governance.

decree.³⁹ The 2014 Directive allowed the French Law of 2017⁴⁰ to strengthen the efficiency of this system. Since then, information provided in the reports must adhere to new criteria: specifically, they must identify the measure necessary to understand the company's situation, the evolution of the company's business, its economic and financial results, and the impact of the activity. The aim of these requirements is to integrate the "materiality matrix" into French law,⁴¹ which is a tool borrowed from financial law that makes it possible to prioritise the strategic use of CSR issues for the company concerned. By carrying out this materiality analysis, the company will identify the subjects that potentially have a significant impact on its business.⁴² For example, water consumption is *material* for a soft drink seller, but not necessarily for a communication company. This integration into positive law makes it possible to respond to one of the criticisms of the French financial markets supervisory body (AMF),⁴³ which noted

39 Three main types of indicators are targeted: company information, environmental information, and information relating to societal commitments in favour of sustainable development. See B. François, « Reporting RSE : commentaire du décret n° 2010-557 du 24 avril 2012 », *Rev. sociétés* 2012, p. 607 et seqq.

40 Ordonnance 2017-1180 du 19 juillet 2017 relative à la publication d'informations non financières par certaines grandes entreprises et certains groupes d'entreprises (on the publication of non-financial information by certain large companies and certain groups of companies). See, in particular, M. Supiot, « Rapport de gestion : nouveau format de présentation des informations sur le gouvernement d'entreprise, réorganisation des obligations d'information, allègement et clarification des obligations pour les petites entreprises, nouveau dispositif de reporting extra-financier », *JCP E* n° 37, 14 septembre 2017, act. 636. See also Ordonnance n° 2017-1162 du 12 juillet 2017 portant diverses mesures de simplification et de clarification des obligations d'information à la charge des entreprises (on various measures to simplify and clarify the information obligations of companies). See also Décret n° 2017-1265 du 9 août 2017 pris pour l'application de l'ordonnance n° 2017-1180 du 19 juillet 2017 relative à la publication d'informations non financières par certaines grandes entreprises et certains groupes d'entreprises (adopted for the application of Ordonnance n° 2017-1180 du 19 juillet 2017 sur la publication des informations non financières par certaines grandes entreprises et certains groupes d'entreprises / on the publication of non-financial information by certain large companies and groups companies).

41 Which would be the translation of *materiality*, however a more appropriate term would be that of "relevance".

42 CSR actors have taken up this practice, in particular the *Global Reporting Initiative (GRI)* and the *International Integrated Reporting Council (IIRC)*. For the GRI, "issues that have a direct or indirect impact on the organization's ability to create, preserve or erode value [...] for itself, for its stakeholders and company as a whole".

43 AMF Report on information published by listed companies on company, societal and environmental responsibility, 5 November 2013; C. Malecki, « Des chiffres et des

that while French companies have improved the structure of information and that the efforts made [...] in terms of CSR have been considerable",⁴⁴ "companies still needed to adopt a 'pragmatic' approach allowing them to identify and prioritise the information to be included in their strategy".⁴⁵

But the question remains: does non-financial reporting have an influence on company interest? Non-financial reporting requires the company to specify the direction it intends to follow in terms of CSR in its management report submitted to the general meeting. Accordingly, non-financial reporting obligations allow non-financial objectives to be integrated into the mission of the directors. However, this influence of non-financial reporting is relative. First, the influence of *reporting* depends on the size of the company. Today, listed companies are only required to report if they meet certain thresholds.⁴⁶ SMEs and VSEs, as well as simplified joint-stock companies (SAS), which represent a significant proportion of companies, are thus *de facto* excluded from the scope of the text.⁴⁷ In addition, through the practice of *comply or explain* authorised by the decree, the company may exclude or mitigate certain CSR values.⁴⁸ Moreover, the influence of *reporting* is relative because of the sanctions attached to it. While the legal texts do not provide for a special sanction in the event of inaccuracy of non-financial information, sanctions for inaccurate reporting of non-financial information do exist in practice in the form of damage to reputation, which can lead to the end of contractual relations, the withdrawal of certain

lettres... de la noblesse du *reporting* non financier », *Bull. Joly Sociétés* 2013, p. 780 et seqq.

44 AMF Report above, p. 5.

45 *Ibid.*

46 The lowest thresholds are set at more than €20 million for the balance sheet, more than €40 million for the net amount of turnover, and more than 500 permanent employees. However, these thresholds are now assessed at the consolidated level when the company prepares consolidated accounts. Previously, thresholds were examined at the level of the parent company only.

47 The question of application to simplified joint-stock companies and in general to small businesses arises, since they represent a significant part of economic activity. Also, size criteria could replace the rating criterion. See the recommendations of the CSR Platform, <http://www.actu-environnement.com/ae/news/reporting-societal-recommendations-rse-platform-22120.php4> [last accessed Dec. 28 2024].

48 With regard to *comply or explain*, the AMF recommends that "companies include in their registration document a summary table of the information they do not publish, distinguishing between those that cannot be produced and those that do not appear relevant to them, as well as the related detailed explanations". See AMF Report above, p. 8.

shareholders, or the *boycott* of products by consumers.⁴⁹ In addition, the publication of inaccurate or misleading information falls within consumer law via the law of misleading commercial practices,⁵⁰ and also within financial criminal law, through the offence of false or misleading information.⁵¹ However, tools based on company interest are not significantly impacted by this reporting obligation, except when it comes to the mismanagement of managers.

The duty of vigilance of parent companies also makes it possible to integrate CSR values into the compass of company interest. In France, the 2017 law⁵² integrated this tool into the French Commercial Code. Under these regulations, companies must establish a vigilance plan that "includes reasonable due diligence measures to identify risks and prevent serious violations of human rights and fundamental freedoms, the health and safety of persons and the environment, resulting from the activities of the company and those of the companies it controls [...]".⁵³ Thus, a company's vigilance plan must include risk mapping, regular assessment procedures, actions to mitigate or prevent serious damage, an alert mechanism, and

49 See, in particular, G. Tusseau, « Vers un renversement du credo positiviste? L'éthique comme paradigme de nouvelles formes de juridicité », *Revue des juristes de Sciences Po*, n° 4, novembre 2011, p. 43 et seqq.; N. Cuzacq, "Le mécanisme du *Name and Shame* ou la sanction médiatique comme mode de régulation des entreprises", *RTD com.* 2017, p. 473 et seqq.; G. Goffaux Callebaut, "Garantie normative et responsabilité sociale des entreprises", in C. Thibierge (ed.), *La garantie normative – Exploration d'une notion-fonction*, *op. cit.*

50 Two years imprisonment and a fine of 300,000 euros (or a percentage of turnover), art. L. 121-1 C. conso.

51 Five years imprisonment and a fine of 100 million euros (up to a tenfold increase in the benefit derived from the offence), art. L. 465-2-1 CMF (amended by Loi n° 2016-819 du 21 juin 2016 réformant le système de repression des abus de marché / reforming the system for the repression of market abuse).

52 Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (on the duty of vigilance of parent companies and contracting companies). On the project, see in particular the dossier *Le Big Bang des devoirs de vigilance ESG : les nouveaux enjeux de RSE et droits de l'homme*, RLDA n° 104, mai 2015, p. 66 et seqq.; N. Cuzacq, « Le devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre : Acte II, scène 1 », *D.* 2015, p. 1049 et seqq.; G. Goffaux Callebaut, « La responsabilité des sociétés mères et entreprises donneuses d'ordre », *Revue internationale de la compliance et de l'éthique des affaires*, juin 2015, comm. n° 65, p. 35 et seqq.; P. Abadie, « Le devoir de vigilance des sociétés mères : responsabilisation actuelle, responsabilités à venir », *Gaz. Pal. HS*, juin 2016, p. 65 et seqq.

53 C.com., art. L. 225-102-4-I.

a system for monitoring the implemented measures and evaluating their effectiveness. The company's CSR concerns must therefore be integrated into the management report, a public document that informs current and future shareholders and savers of the company's commitments, thus integrating these values into the compass of the company's interest. While the 2024 European Directive⁵⁴ will bring technical changes to this framework, no specific sanctions exist in the French tools using the criterion of company interest.

The influence of CSR values on company interest as a compass for the governance of companies therefore seems to be effective, even before the adoption of the PACTE Law, and even if the result is just internal effects within the company. But CSR concerns also involve instruments of positive law that are based on company interest, which leads us to consider the second function of company interest, namely as an instrument for policing companies.

II. Company Interest Considered as an Instrument for the Police of Companies

Company interest is also a necessary counterweight to power: it is an "instrument de police des sociétés".⁵⁵ Under French jurisdiction, company interest – as an instrument of company policing and enforcement – is used to implement certain mechanisms such as the abuse of voting rights or the appointment of a provisional administrator. In this context, does CSR really have an influence on the notion of the company's interest? Indeed, it is uncertain whether judges, tasked with implementing provisions on behalf of company interest, actually takes these new values into account when sanctioning certain behaviours. This question is fundamental in translating

54 Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859 (Text with EEA relevance).

55 S. Rousseau and I. Tchotourian, *L'intérêt social en droit des sociétés – Regards canadiens*, *Rev. Sociétés* 2009, p. 735 et seq., spec. n° 4, quoting A. Constantin, « L'intérêt social : quel intérêt? », *Mélanges Mercadal*, éd. F. Lefebvre, 2002, p. 315 et seq., spec. p. 320) and J. Schapira (« L'intérêt social et le fonctionnement de la société anonyme », *RTD com.* 1971, p. 95 et seq.): "the company interest would thus have become the instrument of a corporate police".

CSR commitments made by companies into legally-binding obligations.⁵⁶ In this regard, some authors consider that "the company's interest appears to be an essential tool for integrating these new paradigms such as sustainable development, corporate social responsibility, or *stakeholder theory*, within the governance and legislative framework".⁵⁷ From this point of view, which is based on the idea of constraint, the influence of CSR considerations is less obvious (1). However, the PACTE Law has recently integrated company interest into the Civil Code and introduced a reference to social and environmental concerns (2).

1. The Weak Influence of CSR Concerns in Current Case Law

In French positive law, company interest is classically defined as the interest of the company to last and develop. Traditionally, case law is independent from doctrinal debate,⁵⁸ with a few exceptions.⁵⁹ However, given the importance of CSR, it is now debated whether case law should take into account a broader interest, integrating social and environmental concerns.

An analysis of case law shows that CSR data is not taken into consideration in determining company interest. This is evident for all the police measures of companies, whether they concern the limitation of the powers of directors,⁶⁰ the definition of control of one company by another,⁶¹ or the definition of the misuse of company assets.⁶² In no case did the analysis of the case law reveal that ethical data was considered in defining company interest.

Looking at a large number of decisions of the Cour de cassation, the definition of company interest has, up until now, always been the same: it is the interest of the legal person to develop and last.⁶³ Judges consider

56 For a general view, refer to : F.-G. Trébulle and O. Uzan (eds.), *La responsabilité sociale des entreprises – Regards croisés Droit et Gestion*, Economica, 2011.

57 S. Rousseau and I. Tchotourian, art. *supra*, spec. n° 1.

58 See A. Vézinet, « La position des juges sur l'intérêt social », *op.cit.*

59 Fruehauf Case, Paris 22 mai 1965, *supra*.

60 For civil partnerships, art. 1848 C.civ.: "in relations between partners, the manager may carry out all management acts in the interest of the company"; for the SNC, art. L. 221-4 C.com.; for SARLs, art. L. 223-18 C.com., referring to Section L. 221-4 C.com.

61 C.com., art. L. 233-3.

62 C.com., art. L. 242-6.

63 Here, a parallel with Slovenian law can be envisaged.

that an act likely to compromise the very existence of the company is contrary to the company's interest.⁶⁴ In this context, the integration of environmental considerations into company policy by the shareholders could not outweigh survival of the legal entity. Indeed, as specified by the Third Civil Chamber of the Cour de cassation's September 12, 2012 decision,⁶⁵ "the consent of the shareholders does not allow the validation of an act contrary to the company's interest".

However, environmental considerations may not necessarily call into question the continuity of company. For example, it is conceivable that a judge could recognize that a director has not respected the environmental goals that shareholders have required. But, so far, such a decision is just legal fiction; generally, CSR issues are just not considered.

How can this classic solution be justified?⁶⁶ The first reason is theoretical: company interest must not be confused with general interest.⁶⁷ Integrating social and environmental considerations into company interest moves away from the traditional function of the general interest of the company. CSR makes it possible to question "the very purpose of companies and their integration into a legal order that excludes neither the general interest nor public order".⁶⁸ But this means forgetting that a company follows a principle of specialty, both legal and statutory, which distances it from the general interest. Moreover, under French jurisdiction, when assessing a company's interest, a judge cannot interfere with the life of the company, which may prevent the judge from taking CSR issues into consideration. Another basis for the solution is judicial practice. Judges only answer the questions that are put to them. Thus, if shareholders or directors do not base their requests on aspects related to CSR, judges do not provide answers to these questions. However, the introduction of a class action in environmental matters may make it possible to change things.

That being said, traditional solutions may have to change. Five years ago, the legislator integrated the social and environmental considerations into company interest, which has brought to light certain difficulties.

64 Com. 23 septembre 2014, n° 13-17347, *Bull. civ.* IV, n° 142; Civ. 3, 27 avril 2017, pourvoi n° 16-12388.

65 Civ. 3, 12 septembre 2012, n° 11-17948, *Bull. civ.* III, n° 121.

66 For a general view, refer to: F.-G. Trébulle, « *Stakeholders Theory* et droit des sociétés », *Bull. Joly Sociétés* 2006, p. 1337 et seq. et 2007, p. 7 et seq.

67 V. M. Mekki, *L'intérêt général et le contrat – Contribution à une étude de la hiérarchie des intérêts en droit privé*, LGDJ, coll. Bib. Dr. privé, t. 411, n° 687 et seq.

68 *Ibid.*

2. The Legislative Integration of CSR Concerns into Company Interest

The integration of social and environmental concerns into company interest was achieved by the PACTE Law, but this integration has also raised some difficulties.

Before the PACTE Law of 2019, paragraph 1 of Section 1833 of the Civil Code referred to the common interest of the shareholders (and not the company's interest) at the time of the incorporation of the company (not during its lifespan). Based on the Notat-Senard report,⁶⁹ the PACTE Law integrated company interest into the Civil Code by adding a second paragraph to Section 1833, which stipulates that "the company is managed in its company's interest, taking into consideration the social and environmental issues of its activity".⁷⁰ The text does not specifically define company interest⁷¹ as such. Given this definition, previous case law of the Cour de Cassation becomes interesting. Simply, the text specifies that all companies must consider social and environmental issues, in addition to company interest, in their activities. These concerns, which are voluntarily integrated into company operation through their codes of ethics or the display of labels, are now also imposed on company directors, regardless of the size of the company in question. In addition to the Civil Code, this approach is also included in the Commercial Code as part of the missions of the boards of directors and the supervisory boards of public limited companies.

But integrating environmental concerns into company interest may be difficult for judges. Determining the higher interest of the company is already delicate. The rule adds the difficulty of articulating the company interest with the general economic, social, and environmental interests that underscore the consideration "of the social and environmental issues of one's activity", even if the text no longer mentions the term "*interest*" as in previous versions, but the term "*issues*". Judges therefore have to define company interest in cases themselves, balancing the various economic, social,

69 N. Notat and J.-D. Senard, *L'entreprise, objet d'intérêt collectif*. Report submitted on March 9, 2018. Online on the website of the Ministry of the Economy and Finance. For a critical reading of the report, see A. Couret, « La réforme de l'entreprise passe-t-elle nécessairement par une réécriture du Code civil? », *Rev. Sociétés* 2018, p. 639 et seqq.; J. Paillusseau, « Entreprise et société. Quels rapports? Quelle réforme », *D.* 2018, p. 1395 et seqq.

70 Art. 169 I, 1°, of the PACTE Law.

71 In this sense, refer to: D. Schmidt, « Loi PACTE: l'intérêt social », *JCP E*, n° 26, 27 juin 2019, 1318.

and environmental issues, while articulating both the company interest and the general interest, all without interfering with the management of the company. The exercise may be perilous in French jurisdiction,⁷² even if the objective is laudable.

In conclusion, for the past ten years, French law has offered many possibilities for integrating CSR considerations into tools mobilizing company interest. Among these, the latest innovations of the PACTE Law are certainly the most promising when it comes to including sustainability in company law. Some of these tools could easily integrate European law, as has been done with extra-financial reporting or the duty of vigilance. Such integration at the EU level would enhance better corporate governance

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