Legal guide to CSR

GIDE

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INTRODUCTION

Corporate social or societal responsibility (CSR) is defined by the European Commission as "the responsibility of enterprises for their impacts on society". It concerns the environmental, social or societal aspects of the enterprise's management, strategy and activities and its governance (ESG), which are the extra-financial criteria used by investors to assess the enterprise's performance in terms of sustainability.

The place of CSR in companies' management, strategy and communication has developed considerably over the last few years. There are several explanations for this: the importance assumed by the challenges of sustainable development, the growing perception of the role to be played by companies in meeting those challenges, the backlash against a vision of the company as an entity whose sole purpose is to benefit its shareholders, and the occurrence of dramatic events have all greatly contributed to increasing civil society's sensitivity to these matters.

One conviction is now widely shared: taking ESG issues into consideration is a major long-term performance factor for a company. The Covid crisis has confirmed that taking these issues into account has a positive impact on the resilience of a company and its ecosystem.

Companies' stakeholders have increasingly high expectations with regard to ESG. This particularly concerns the company's impacts and actions in relation to the environment and climate change, but also with regard to human rights, diversity, health and respect for the human person. Investors in listed companies are demanding dialogue with the company's board of directors and management on ESG issues as part of their engagement policy. Without good dialogue, this can lead to the tabling of resolutions by minority shareholders, and even to activist campaigns.

If a company is deficient in its management, strategy or communication with regard to ESG issues, it undermines its long-term performance, not least because it risks damaging its reputation and the quality of its relationship with its stakeholders, as illustrated by the allegations of forced labour of Uyghurs made against certain companies.

But taking social and environmental issues into consideration is also important for legal reasons.

CSR is subject to an increasing number of rules, some of which relate to disclosure and communication by the company, and others to its management and strategy: these are all being applied to a growing number of companies. Common law and these specific rules provide a variety of foundations for legal action against the company, and in some cases against its executives.

Since the passing of the PACTE Law in 2019, a company must be managed in its social interest, taking into account the social and environmental issues associated with its activity. In addition to the management, the board of directors must give full consideration to ESG issues in defining the direction of a company's activity. Beyond the Due Diligence Law, there is also the question of the existence of a common-law duty of due diligence that could be imposed on companies with regard to the main ESG issues, including climate-related issues. A Dutch court recently ruled this way when it ordered Shell to reduce its greenhouse gas emissions by 45% by 2030, a decision that Shell has appealed.

Knowing this complex and shifting foundation of rules and the consequences to which they expose the company has become a necessity. In the face of these challenges, companies must adapt in order to seize opportunities and reduce their legal and reputational risks.

The purpose of this guide is to address the main legal aspects of CSR. It covers the rules that apply to all companies, but not those specific to certain sectors, notably the financial sector.

Its authors are members of Gide's ESG/CSR/Sustainable Development practice.

It will be regularly updated.

It describes various aspects of corporate governance and management that need to be taken into account in order to address these issues, seize the opportunities and reduce the risks they represent (1).

It also provides legal obligations in the field of CSR, with a particular focus on those relating to disclosure and communication (2).

Lastly, it addresses the legal obligations relating to the very management of a company (3).

01

IMPLICATIONS FOR CORPORATE MANAGEMENT, STRATEGY AND GOVERNANCE

In order to capitalise on the opportunities and limit the legal and reputational risks related to ESG issues, CSR must infuse a company's governance as well as its operational management.

1.1 CORPORATE GOVERNANCE

Because it is responsible for setting the direction of the company's activity while taking the associated social and environmental issues into account, and because it is the main body involved in strategy and long-term issues, the board of directors must fully address ESG issues.

In particular, it must arbitrate between these long-term considerations and those relating to shareholders' expectations of short- and medium-term performance. This responsibility was strongly reinforced by the PACTE Law (see section 3.1.2.1).

The EU proposal for a directive on corporate sustainability due diligence of 23 February 2022 (see section 3.1.3.2) provides for strengthening the duties of directors by introducing the obligation for them:

- to set up and oversee the implementation of due diligence and to integrate it into the corporate strategy, and
- when fulfilling their duty to act in the best interest of the company, to take into account the human rights, climate change and environmental consequences of their decisions.

Of course, the means depend on the size of the company, on whether it is listed, and on its activity.

In particular, it is generally recommended that the board of directors[2]:

- ensures that ESG issues are at the heart of the definition of the corporate strategy,
- ensures that management employs the means to identify and map the issues, risks and opportunities, establishes an order of priority and identifies the decisions that could have an impact on those issues, risks and opportunities;
- structures the functioning of the Board and its links with the company's management so that it is fully involved and informed about the ESG issues for the company,
- entrusts the monitoring of ESG issues to a Board committee and, where appropriate, create a CSR committee,
- ensures that its members are trained to have knowledge and understanding of these issues,
- ensures the proper composition of the board of directors in terms of independence, gender balance, diversity, age and skills, particularly with regard to sustainability issues,
- documents the rationale for decisions in the light of these issues,
- for companies that publish extra-financial information, ensures the adequacy and effectiveness of the information production procedures (see section 1.4),
- primarily for listed companies, ensures the alignment of executives' interests by making a portion of the variable remuneration conditional upon the achievement of ESG objectives (see section 1.3),
- and, for listed companies, makes ESG issues a priority topic in the board of directors' dialogue with shareholders (see section 1.2).

Corporate management teams[3] are generally recommended to:

- ensure that the company is able to comply with the many rules on environmental and social issues, including compliance, fraud, GDPR, gender balance, discrimination and harassment,
- establish an effective and relevant organisation and procedures to identify, measure, consider and manage these issues, with regard to both the risks and the opportunities, and to integrate them into the management and strategy of the company by entrusting the responsibility for them to a committee assisting the company's management, such as a strategy committee or executive committee or, where appropriate, a CSR committee,
- train employees, executives and directors on these issues,
- prepare the decision-making of the executive and administrative bodies through analyses of the impact of these issues on the decisions to be taken,
- and document the rationale for decisions in the light of these issues.

Listed companies must also take into account the sources of soft law on corporate governance, in particular:

- corporate governance codes (see section 3.1.1.1),
- the voting policies of voting advisory agencies (see the voting policies of Proxinvest, ISS and Glass Lewis), which cover, in particular:
  - the question of including ESG criteria in the variable and long-term remuneration of executives (see section 1.3),
  - "Say on climate" resolutions (see section 1.2),
  - and the monitoring of climate, environmental and social issues by the board of directors,
- the recommendations of the French Financial Markets Authority (AMF), including its 2016 recommendations on social, societal and environmental responsibility, its CSR report of November 2019 and its Guide to continuous disclosure.

1 Art. L. 225-35 of the Commercial Code. Law no. 2022-296 of 2 March 2022, which amended that article, as well as Article L. 225-64 of the same Code, added sporting and cultural issues, while noting however that this amendment has been widely criticised and is likely to be abolished by a future legislative text.

2 See Institut français des administrateurs [French Institute of Directors] (IFA), "Guide sur le rôle du conseil d'administration dans la prise en compte des enjeux climatiques" ["Guide to the role of the board of directors in the consideration of climate issues"], Dec. 2019.

3 The Haut Comité Juridique de la Place Financière [Legal High Advisory Committee for Financial Markets] of Paris has made recommendations on this subject (see Rapport sur la responsabilité des sociétés et de leurs dirigeants en matière sociale et environnementale [Report on the social and environmental liability of companies and their directors, 19 June 2020, no. 93 et seq.).

1.2 DIALOGUE WITH SHAREHOLDERS

For listed companies, ESG issues are the subject of increasingly high expectations for investors, who are demanding access to the boards of directors to raise these issues.

Taking these considerations into account forms a part of their shareholder engagement policy, as evidenced by the engagement policies of the world's two largest investors, BlackRock[4] and Vanguard[5]. These topics are on the agenda for the dialogue that they intend to have with the board of directors.

The AMF, in the latest version of its Guide to Continuous Disclosure dated April 2019, recommends that issuers "establish a dialogue between the Board and shareholders, where appropriate through the intermediary of a lead director, on the main topics of shareholder attention, including issues related to social, environmental and governance (ESG) strategy and performance".

Including ESG topics in their dialogue with investors makes it possible to identify, before the general meeting, any criticisms or questions related to these topics.

If this is not carried out, the Board of Directors exposes itself to actions such as:

- the tabling of resolutions by minority shareholders, including "climate" resolutions or demands for the appointment of directors with knowledge of these matters,the rejection of resolutions on the reappointment of directors, as some voting advisory agencies advocate voting against the reappointment of the Chairman, and, if applicable, the members of the committee responsible for CSR, in the event of a deficiency in the monitoring of ESG issues,
- activist campaigns.

The company's climate policy receives special attention from investors, especially in certain sectors. In some cases, for example, minority shareholders have tabled climate-related or "Say on climate" resolutions. Depending on their sector, some listed companies are debating about placing such a resolution on the agenda.

Climate-related/"Say on climate" resolutions:

Certain shareholders of TotalEnergies and Vinci have tabled climate-related resolutions with the aim of causing the company to submit a climate plan to the annual general shareholders' meeting. The TCI fund, which tabled such a resolution in 2020 for Vinci's annual meeting, argued that its approach was justified by the pursuit of economic performance, on the principle that the companies that best anticipate energy and environmental transitions would be those most highly valued by the markets.

This approach has played a key role in the emergence of the "Say on climate" resolutions now being spontaneously proposed by some issuers.

These resolutions involve submitting to an advisory vote of the annual general shareholders' meeting a resolution concerning the management's plan for the company's climate transition.

In 2021, TotalEnergies, Vinci and Atos placed such resolutions on the agenda for their annual general meeting.

This number could be significantly higher in 2022, as three issuers have already announced their decision to do so, namely TotalEnergies, Engie and Amundi.

The voting advisory agencies adopt case-by-case positions on "Say on climate" resolutions, based on criteria set out in their voting policies (see p. 50 of the Proxinvest policy and p. 25 of the ISS policy).

In May 2022, TotalEnergies rejected a request for a climate resolution tabled by minority shareholders, citing the division of powers between the corporate bodies.

In the future, such resolutions could address other ESG issues.

Traditionally, the subjects of activism are more concerned with governance issues than social or environmental issues. But activism is also developing in relation to environmental issues, and might in future also address social or societal issues.

ESG activism:

In some jurisdictions, we have seen true activist campaigns emerge in connection with ESG issues. Three examples can be cited for 2021 alone:

- The Bluebell Capital fund demanded the dismissal of Solvay's general manager, whom it criticised for not taking action to end the environmental problems affecting one of the group's plants. To date, this demand has not been met.
- The activist fund Third Point called on Shell (to date, without success) to split the company's activities between renewable energy on the one hand and fossil energy on the other.
- However, the Engine No. 1 fund, with the support of the BlackRock and Vanguard funds, succeeded in obtaining the appointment of three directors to the Board of Exxon Mobil, against the advice of the company's management, arguing that the composition of the Board was not capable of allowing climate issues to be satisfactorily taken into account (see the article published by Le Monde on the subject).

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1.3 ALIGNMENT OF THE INTERESTS OF EXECUTIVES AND EMPLOYEES IN RELATION TO ESG CRITERIA

Aligning the interests of executives and employees in relation to key ESG criteria for the company is a way of ensuring that they give the relevant objectives all the attention they deserve.

Say on pay

In listed companies, the inclusion in executives' variable and/or long-term remuneration (stock options, free shares) of a portion linked to the fulfilment of ESG criteria has become a very common practice.

Shareholders are called upon to decide on this in the context of "Say on pay".

The AFEP-MEDEF Code[6] and the Haut Comité de gouvernement d'entreprise [High Committee on Corporate Governance] (HCGE)[7] consider that variable remuneration, and where appropriate long-term remuneration, should incorporate such criteria.

Investors are generally favourable towards this practice in their engagement policy.

The voting advisory agencies are generally favourable to these matters in their voting policy, with a preference for quantitative criteria and the coherence of the chosen criteria with the strategic issues for the company (p. 39 of the Proxinvest policy, pp. 21 and 22 of the ISS policy, and p. 23 of the Glass Lewis policy).

The criteria used relate to one or more ESG issues of importance for the company.

The climate criterion:

In particular, the integration of quantitative climate criteria into executives' variable remuneration is becoming increasingly common. This is the logical continuation of the implementation of the climate action plan founded on the zero-emission commitment on which many companies communicate. This includes aligning with investors' legal obligations[8] in order to provide transparency regarding the climate trajectories of their assets and their demand for implementing the climate plan of the companies in which they invest.

According to a study published in November 2021 jointly by the IFA, Chapter Zero France, and Ethics & Boards, 74% of CAC 40 companies include at least one quantitative climate criterion in the remuneration policy for their executives. 52% tie their executives' remuneration to short-term quantitative climate targets, 45% to long-term targets, and 20% to a combination of short- and long-term targets. EFRAG[9] recommends that extra-financial reports[10] should indicate, among other things, any internal climate-related incentive mechanisms[11].

This trend is reinforced by the proposal for a directive on corporate sustainability due diligence (see section 3.1.3.2), which provides that when company executives receive variable remuneration, they should be encouraged to contribute to combating climate change by referring to the corporate plan.

Lastly, we note that the Rocher report delivered to French Minister of the Economy and Finance Bruno Le Maire on 19 October 2021 recommends that a portion of the variable remuneration (minimum target of 20%) of employees and executives should be conditional upon extra-financial criteria linked to the company's *raison d'être*.

The integration of ESG criteria into remuneration is also on the rise in unlisted companies, and is beginning in private equity operations.

This practice can be extended to all or part of a company's workforce.

1.4 DUE DILIGENCE IN EXTRA-FINANCIAL REPORTING

Some companies with more than 500 employees are required to prepare an Extra-Financial Performance Statement (EFPS) (see section 2.2.1), and some of them are subject to the provisions of the Taxonomy Regulation (see section 2.2.2).

Extra-financial information contributes to the assessment, monitoring and management of the company's overall performance, including its social, societal and environmental performance and its impact on society. It enables the company's stakeholders to assess whether the level of its commitment meets their own expectations.

6 According to Article 25.1.1 "the remuneration of executives (...) must be aimed, inter alia, at promoting the company's performance and competitiveness in the medium and long term by integrating one or more criteria relating to social and environmental responsibility".

7 Report of November 2020: "it is no longer acceptable for the determination of an executive's variable remuneration not to incorporate an environmental criterion. The CSR/ESG criteria used for variable remuneration, whether annual variable remuneration or long-term incentive remuneration, must be defined in a precise, measurable and verifiable way".

8 Article 173 of the Energy Transition for Green Growth Act of 2015. Article 29 of the Energy and Climate Act of 2019. EU "Sustainable Finance Disclosure Regulation" of 2019. Taxonomy Regulation of 2020.

9 European Financial Reporting Advisory Group, whose mission is, inter alia, to propose the framework for the future directive on extra-financial reporting.

10 EFRAG working paper, September 2021.

11 Such as "remuneration incentives for executives on greenhouse gas (GHG) emissions reduction", with metrics such as "percentage of people incentivised for GHG emissions reduction targets achievement" or "relative proportion of variable remuneration indexed on GHG emissions reduction targets achievement". These recommendations are aimed at all European companies, whether listed or unlisted.

Extra-financial disclosure is now inseparable from financial disclosure, and contributes to the assessment of a company's value.
It can also be a source of liability towards investors, or be subject to sanctions by the AMF or the criminal courts (see section 2.3.1).
Extra-financial disclosure must comply with the general principles of relevance (significant or material information), completeness, conciseness, readability, reliability, truthfulness, permanence of methods and indicators to ensure comparability over time, and if possible must be founded on a science-based approach. It should use recognised frameworks.

Frameworks:
The main optional frameworks for extra-financial disclosure that companies can use for the preparation of their extra-financial information are as follows:
- the Global Reporting Initiative ("GRI"),
- the Sustainability Accounting Standard Board ("SASB"),
- the Task Force on Climate-related Financial Disclosure (TCFD).

Such information should also follow the soft law recommendations of the AMF and the European Commission (see section 2.2.1).
Executives and directors[12] must pay special attention to the extra-financial information released by the company. They must ensure in particular:
- the adequacy and effectiveness of the procedures for producing and disseminating that information,
- that the organisation of work on extra-financial reporting ensures an overall vision and good oversight of how sustainability issues are taken into account in the company,
- that the extra-financial information produced by the company is reliable, relevant, truthful and balanced, and takes both negative and positive impacts into account.

This involves the establishment of an internal and external control system to ensure the reliability of the data, processes and results.

Companies should anticipate the entry into force of the Corporate Sustainability Reporting Directive (CSRD) (see section 2.2.1) and the roll-out of the Taxonomy Regulation when the transitional regime applicable in 2022 comes to an end (see section 2.2.2).

1.5 RELATIONS WITH STAKEHOLDERS

The quality of the company's relations with its stakeholders (shareholders, employees, suppliers and customers, but also public authorities, communities in which the company carries out its activities, NGOs, etc.)[13] contributes to the company's long-term performance and resilience, as has been highlighted by the Covid crisis. It involves dialogue with the stakeholders, which can take different forms.

Stakeholder committee:
In companies of a certain size, in recent years we have seen the development of stakeholder committees with a consultative role, composed of stakeholder representatives and sometimes experts.

The creation of a consultative stakeholder committee, as advocated in a recent IFA report[14], can provide the following benefits:
- identification of stakeholder expectations,
- escalation of weak signals,
- where appropriate, deepening the implementation of the *raison d'être*,
- comparison of the interests of different stakeholders, thus helping the governance bodies to arbitrate between their respective interests when they diverge.

It is recommended that both the management and the board of directors interact with this committee, as the issues that concern it relate to ESG.
In a société à mission [mission-driven company], the mission committee may fulfil this role.

1.6 COMPLIANCE, ETHICS AND APPLICATION OF CSR REGULATIONS

The company must, of course, ensure that it can comply with the numerous mandatory rules on social and environmental issues, compliance, fraud (see section 3.2.3.1(a)) and the GDPR (see section 3.2.3.2), gender balance (see section 3.2.2.1), discrimination (see section 3.2.2.2(b)) and harassment (see section 3.2.2.2(c)). These rules may be a source of civil liability or sanctions, and their violation may damage the company's reputation, given civil society's very high sensitivity to these matters.

1.7 CONTRACTUALISATION OF CSR COMMITMENTS

CSR involves ensuring, beyond a company's own practices, the level of risk and commitment of the various actors in its value chain.
Increasingly often, clauses to this effect are included in the contracts concluded by the company with its suppliers and subcontractors.
A 2018 study by Ecovadis and Affectio Mutandi presents an overview and an analysis of the most common clauses.

12 See IFA Report "The board of directors and extra-financial information", April 2021.
13 It should be noted that there is no legal definition of the concept of 'stakeholder', but it is generally considered to encompass all persons who participate in the economic life of the company and are directly or indirectly affected by it. Despite the lack of a precise definition, this concept is used in some legislative texts, including in company law. Article R. 225-105 of the Commercial Code specifies that the information to be provided for the EFPS should include: "relations with the company's stakeholders and the manner in which dialogue is conducted with them". The Due Diligence Law provides that the due diligence plan should be drawn up in association with the stakeholders.
14 "Stakeholders: their place in corporate governance", IFA, December 2020.

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These clauses aim to:
- generally have the company's suppliers or subcontractors adhere to a charter containing a number of principles and/or to reference texts (Global Compact, OECD Guidelines) with which they undertake to comply,
- have them make commitments in relation to different ESG criteria, beyond the usual clauses concerning corruption and anti-money laundering, or set objectives,
- sometimes provide for the possibility of evaluating the supplier's progress with regard to certain criteria, or of conducting or arranging audits or verifications to ensure that the CSR commitments made by suppliers or subcontractors are met,
- sometimes provide for the consequences of a breach of commitments made, in terms of (i) liability or (ii) the right to suspend or terminate contracts in the event of a serious breach of some of those commitments,
- and sometimes require the supplier or subcontractor to ensure that its own suppliers or subcontractors comply with equivalent principles.

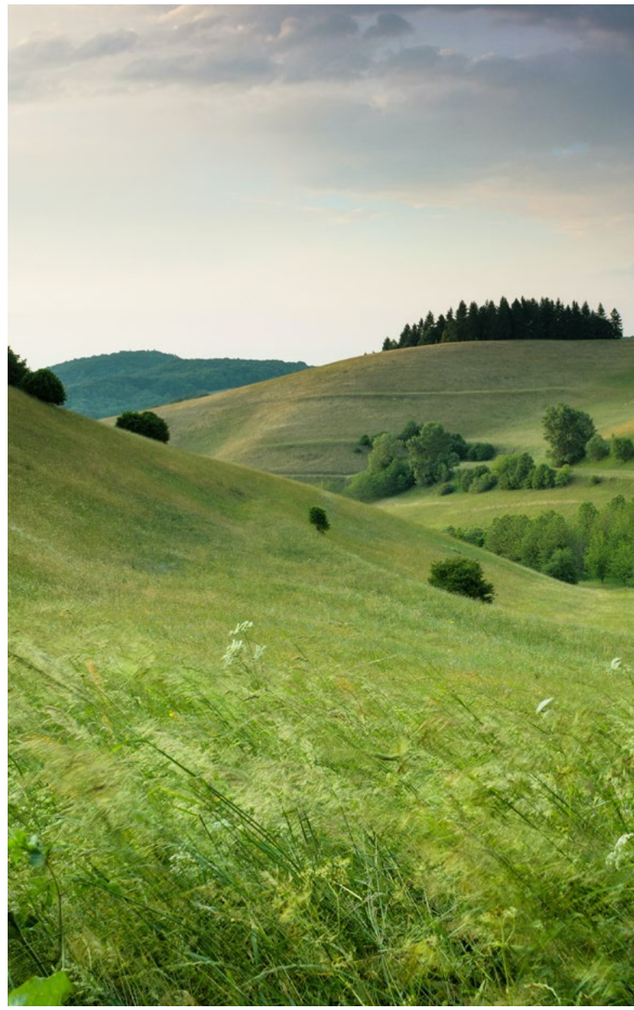
Due diligence
Companies that are bound by the provisions of the Due Diligence Law must put in place the procedures provided for by that law (see section 3.1.3.1).
They tend to pass on their obligations to their suppliers and subcontractors, including by having them make contractually binding commitments concerning the environment, human rights, fundamental liberties and health.

The proposal for a directive on due diligence stipulates that companies bound by its provisions must:
- seek contractual assurances from their partners that they will comply with the order-giver's code of conduct and, if applicable, their action plan, and
- match these clauses with suitable means for verifying compliance with these commitments.

All companies likely to be affected by the duty of due diligence after the transposition of the due diligence directive (see section 3.1.3.2) have an interest in anticipating the transposition of the directive, in particular by already inserting these types of clauses into their long-term contracts.
Depending on the sector, CSR clauses may also be applied to the customer, for example with regard to the use of the services or products sold, or to the partner.

CSR clauses are also found in other types of contracts, in particular:
- financial contracts (loans, green bonds), or
- real estate contracts (green leases).

In this case, these clauses may take the form of incentives (for example, more favourable financial conditions) if ESG criteria or impact measures are met; or, conversely, disincentives if these principles are not complied with or these criteria are not met.



CSR rating:
It is also becoming increasingly common for companies to have the quality of a supplier's CSR policy verified by assessment bodies or to rely on the work of rating agencies.

Suppliers, for their part, are encouraged to adopt an ambitious CSR policy and, where appropriate, to adhere to programmes such as the Global Compact, obtain labels such as LUCIE or B-Corp, or commit to standards such as ISO 26000. This will allow suppliers not only to anticipate their customers' increasing requirements in this regard, as formalised in their charter, but also to improve their rating by assessment bodies and rating agencies, which can be taken into account in a response to a call for tenders.

1.8 DUE DILIGENCE IN ADVERTISING AND INSTITUTIONAL AND COMMERCIAL COMMUNICATION

Legal action is increasingly being brought by associations on the basis of legislation regarding misleading commercial practices or advertising. These are aimed in particular at claims relating to the environment or respect for human rights. In addition, the rules on environmental claims are becoming stricter under the Climate and Resilience Law. Against this background, companies should:

- pay special attention to their communication when it involves ESG aspects,
- and take account of the recent texts and guidelines concerning this communication (see section 2.3.2).

They should also be aware that certain materials could be taken into account in assessing the existence of such practices, even when they do not have a primarily commercial purpose, so long as they are likely to influence consumers' decisions.

1.9 CONSIDERATION OF CSR ISSUES IN MERGERS, ACQUISITIONS AND INVESTMENTS

The assessment of ESG issues and the target's CSR policy is carried out upstream of a merger, acquisition or investment operation.

For companies that carry out mergers, acquisitions and investments, a CSR audit of the target company should be added to the usual scope of their pre-operation audits and the anti-corruption compliance audit (in 2021 the French Anti-Corruption Agency published a recommendation on acquisition audits).

In addition to the legal risks that could be entailed, the existence of ESG deficiencies could affect the target's valuation, reputation or financing ability.

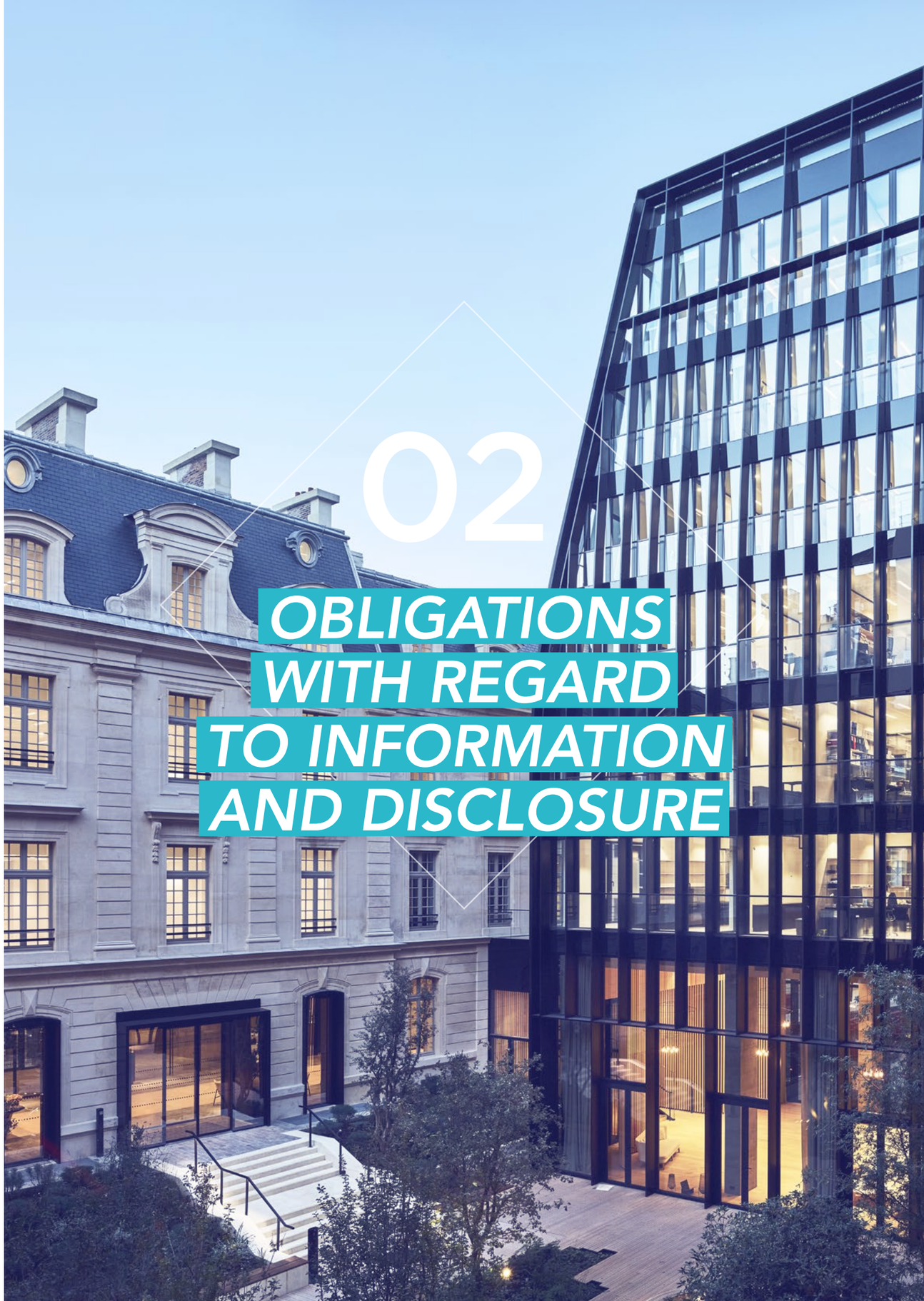
This audit involves, where applicable:

- a review of the company's documentation relating to its CSR policy, in particular that produced by the company in relation to extra-financial information or a due diligence plan, if such exists, and the responses provided to assessment bodies,
- a questionnaire on practices and adherence to a number of ESG principles within the company,
- and a review of the procedures put in place by the company to ensure compliance with its CSR policy.

Additionally, or alternatively, specific stipulations may be inserted in the representations and warranties of contracts.

It is also increasingly common to insert provisions in the contracts and covenants concluded at the time of the investment that bind the target company and its management to ESG commitments.

Clauses may also be inserted in these contracts to provide ESG reporting obligations.



02 OBLIGATIONS WITH REGARD TO INFORMATION AND DISCLOSURE

Many companies voluntarily disclose their CSR practices, and even make public commitments to adhere to certain principles or values (2.1).
Some of them are required to do so under the rules on non-financial communication (2.2).
Whether voluntary or resulting from legal obligations, the information provided by the company with regard to ESG may give rise to liability or sanctions if it is false or misleading, or if the publicly made commitments are not met (2.3).

2.1 VOLUNTARY DISCLOSURE OF CSR INFORMATION BY COMPANIES

Companies are increasingly being driven to disclose their practices with regard to CSR.

First, they can:
- provide indicators on certain non-financial performance criteria,
- publish figures, make statements,
- adopt a charter, or subscribe to commitments that they make available to the public on their website, in their institutional communication, in their commercial documentation and/or in their financial communication.

Companies can also:
- follow optional frameworks for non-financial information (such as the GRI, SASB or TCFD),
- sign up to the UN Global Compact of 1999,
- declare their commitment to all or some of the 17 Sustainable Development Goals,
- refer to the ISO 26000 standard on sustainable development, and/or
- obtain labels such as LUCIE[15] or B-Corp[16].

Beyond the regulatory and legal requirements (see section 2.2), listed companies are under mounting pressure from investors, and sometimes from activist funds, on the scope of their commitments and the transparency of the information provided to the public (see section 1.2).

Investors and institutions are increasingly applying pressure on companies and demanding them to take a position and communicate on their carbon trajectory.

The European Commission proposal for a directive on corporate sustainability due diligence requires companies with more than 500 employees covered by its provisions to have a plan to ensure that their business model and strategy are compatible with the limiting of global warming to 1.5° C, in line with the Paris Agreement.

Carbon and net zero trajectory
Increasing numbers of companies are reporting targets in terms of carbon trajectory, reducing their greenhouse gas emissions and achieving carbon neutrality or net zero by 2050.

Net zero reflects, at the individual level of each company, the global ambition adopted in the Paris Agreement to reach a point of balance between emissions of greenhouse gases and the absorption of those gases through carbon capture or carbon sinks.
For companies, it is calculated by taking into account "Scope 1, 2 and 3" emissions[17] and their negative emissions resulting from capture or offsetting. "Scope 3" includes emissions resulting from the use or consumption of the company's products or services.

Reference by companies to carbon neutrality is a matter of debate, due to the lack of a clear definition of what this means at company level. To support their approach, some companies have their action plan validated by the Science Based Targets initiative (SBTI).

Companies may also adopt a *raison d'être* in their articles of association, or the quality of mission-driven company. This will lead to management implications (see section 3.1.2.2), and also involves making public commitments (to take the *raison d'être* into account, to pursue social and environmental objectives) on which the company reports.

15 The LUCIE label is the first French CSR label, offering support to companies looking to structure their CSR strategy.
16 B-Corp certification requires companies to complete a 200-question questionnaire covering various topics such as governance, salaries and environmental impacts, achieve a minimum score of 80, and include provisions equivalent to a *raison d'être* in their articles of association.
17 For an explanation of Scopes 1, 2 and 3, see the ADEME website.

2.2 OBLIGATIONS WITH REGARD TO EXTRA-FINANCIAL DISCLOSURE

The mandatory disclosure rules for CSR include:
- the rules relating to the EFPS (2.2.1),
- the rules relating to the Taxonomy of the European Union (2.2.2).

◆ 2.2.1 The EFPS

In accordance with the provisions of Articles L. 225-102-1 and L. 2210-36 of the Commercial Code, certain categories of companies are required to draw up an Extra-Financial Performance Statement[18].

Companies concerned:
The companies concerned are sociétés anonymes [public limited companies], sociétés en commandite par actions [partnerships limited by shares] and certain sociétés en nom collectif [partnerships] (those whose entire capital is held by SAs, SCAs, SASs or SARLs) that meet the following thresholds:
- those whose securities are admitted to trading on a regulated market and whose balance sheet total exceeds EUR 20 million or whose net turnover exceeds EUR 40 million, and that also employ an average of more than 500 permanent employees during the financial year,
- those whose shares are not admitted to trading on a regulated market and whose balance sheet total or net turnover exceeds EUR 100 million, and that also employ an average of more than 500 permanent employees during the financial year.

Other entities, such as credit institutions and insurance companies, may also be required to draw up an EFPS if they meet the relevant criteria applicable to them.

Companies may be required to submit a consolidated Extra-Financial Performance Statement[19].

The information contained in the EFPS published by a company (or a consolidated group, if applicable) must take into account "the social and environmental consequences of its activity"[20], and this information must be presented to the extent "necessary to provide an understanding of the company's situation"[21].

Pursuant to Article L. 22-10-36 of the Commercial Code, companies whose securities are admitted to trading on a regulated market are also required to provide information on their efforts to combat corruption and to respect human rights in the conduct of their business.

Article R. 225-105 of the Commercial Code:
- provides a more detailed list of the information to be covered,
- sets out the format that this statement must take. The statement must present the company's business model, as well as:
  - a description of the main risks related to the company's activity,
  - a description of the policies applied,
  - the results achieved by these policies, including key performance indicators[22].

The information provided is given under the principle of proportionality and subject to the "comply or explain" principle; any lack of information or policy on any of these topics must be duly justified.

The EFPS must be made available on the company's website. If the company has more than 500 employees and its balance sheet total or net turnover exceeds EUR 100 million, its statement must be reviewed and certified by an independent third-party body[23]. Where the management report does not include the EFPS, this must be mentioned by the statutory auditor[24], and any interested party can ask the president of the court, ruling in summary proceedings, to order the board of directors or the executive board, as the case may be, to disclose the required information[25] under penalty of prosecution where applicable.

18 This obligation to publish an EFPS arises from Order no. 2017-1180 of 19 July 2017 transposing European Directive no. 2014/95/EU (the Non-Financial Reporting Directive, or NFRD).
19 Article L. 225-102-1, II of the French Commercial Code: this applies if they prepare consolidated financial statements, and, because of the control that they exercise over other companies, if they meet, together with the companies included in the consolidation scope, the above-mentioned thresholds on a consolidated basis.
20 Article L. 225-102-1, III of the Commercial Code.
21 With regard to environmental issues, the company is required to indicate in its statement the impact on climate change of the company's activities and of the use of the goods and aeconomy and the fight against food waste. With regard to social issues, the statement must cover any collective agreements concluded within the company and their impact on its economic performance and the working conditions of employees, as well as any actions aimed at combating discrimination and promoting diversity and actions in favour of disabled workers.
22 Article R. 225-105, I of the Commercial Code.
23 Article L. 225-102-1, V of the Commercial Code.
24 Article L. 823-10 of the Commercial Code.
25 Article L. 225-102-1 VI of the Commercial Code.

Recommendations of the AMF and the European Commission

The Autorité des marchés financiers [French Financial Markets Authority], in its CSR Report of November 2019, made a number of recommendations for the drafting of the EFPS, including:

- (i) to focus on conciseness by limiting the statement only to the issues considered material for the company,
- (ii) to provide information on the consolidated scope, and consider the relevance/need to expand this scope according to the business model,
- (iii) to provide a methodological note describing the process of collecting extra-financial data, the scopes used according to the indicators, and the calculation methods,
- (iv) to pay particular attention to the process of identifying extra-financial issues and risks, specifying the time horizon within which these potential risks may materialise,
- (v) to select a limited number of extra-financial key performance indicators to measure the monitoring of targets and justify them, and
- (vi) to ensure overall consistency between the business model, identified risks, policies in place and key performance indicators.

The AMF also made a number of recommendations in its 2016 report on social, societal and environmental responsibility.
Reference should also be made to the guidelines provided by the European Commission. These guidelines on non-financial reporting, originally published in June 2017, are very relevant for market participants although not binding. They were updated in June 2019 by a climate supplement incorporating the recommendations of the TCFD and taking into account the analyses of the Technical Expert Group on Sustainable Finance set out in its Report on climate-related disclosures (see section 2.2.2).

THE DRAFT CSRD DIRECTIVE

The EFPS regime is expected to change in the coming years due to the new legislative proposal - the so-called CSRD (Corporate Sustainability Reporting Directive) - currently under negotiation. Published on 21 April 2021 by the European Commission, it will replace the NFRD Directive (Non-Financial Reporting Directive). On 16 February 2022, the Council agreed its position ("General Approach") on the European Commission proposal, and provided the Council presidency with a mandate for further negotiations with the European Parliament, which took place over the spring of 2022 and concluded in June 2022, with a view to reach formal adoption later in the year.

This directive is anticipated to:

- be applicable from financial year 2024, with respect to the data for financial year 2023, for the first companies concerned,
- extend the scope of companies subject to the obligation to publish an EFPS to all large companies (the threshold in terms of workforce is 250 employees)[26], whether listed or unlisted, and to listed SMEs, except microenterprises[27].

The future directive pursues several objectives (see the European Commission Q&A):

- to improve the relevance, reliability and comparability of non-financial information, renamed "corporate sustainability information",
- to harmonise standards for the publication of corporate sustainability information between European law and international law,
- to organise the digitisation of sustainability information,to reduce costs for companies,
- to introduce the principle of "double materiality", i.e. both the risks that may affect the company in relation to social and environmental issues, and the company's own impact in these areas.

Lastly, the directive would require all companies in scope of the proposal to be subject to a verification of sustainability reporting by an independent third-party audit and the obligation to include such sustainability information in the management report. These requirements are already applicable in France today.

◆ 2.2.2 Taxonomy of the European Union

Regulation (EU) 2020/852 of 18 June 2020 on the establishment of a framework to facilitate sustainable investment (the "Taxonomy Regulation") establishes a classification as well as disclosure rules with a view to providing all financial and non-financial actors with a common understanding of when an economic activity should be considered to be environmentally sustainable.

For more details about this Regulation, see the Gide Client Alert issued on 29 July 2021 (link).

Sustainable economic activities are identified as those that, among other conditions, make a substantial contribution to one or more of the following six environmental objectives: (i) climate change mitigation, (ii) climate change adaptation, (iii) the sustainable use and protection of water and marine resources, (iv) the transition to a circular economy, (v) pollution prevention and control, and (vi) the protection and restoration of biodiversity and ecosystems.

Each of these objectives is to be further defined by way of delegated acts specifying the conditions and relevant criteria for the application of the Taxonomy.

To date, only the delegated act concerning the two climate objectives has been adopted, and published in the Official Journal of the European Union on 9 December 2021. In addition, a supplementary delegated act, covering the climate objectives of the EU taxonomy for certain activities in the gas and nuclear sectors, was presented by the European Commission on 2 February 2022 and formally sent to the Council and the European Parliament on 9 March 2022.

26 A large company within the meaning of this text is one that, at the balance sheet date, exceeds the thresholds of at least two of the following three criteria: a) balance sheet total of EUR 20 million; b) net turnover of EUR 40 million; c) an average of 250 employees during the financial year.

27 This applies to all listed companies except microenterprises, which are those that, at the balance sheet closing date, do not exceed the thresholds of at least two of the following three criteria: a) balance sheet total: EUR 350,000; b) net turnover: EUR 700,000; c) average number of employees during the financial year: 10.

This text sets out the conditions under which certain activities in the nuclear and gas sectors may be included in the list of 'transitional activities' covered by the EU Taxonomy. The Council and Parliament have until 9 July 2022 to decide on whether or not they will object.

Since 1 January 2022, the Taxonomy Regulation requires the publication of information for financial year 2021 that, in the case of French companies, must be included in the EFPS. For the first year of implementation however, a less demanding, transitional regime, applies.

Scope of application and information to be provided by non-financial companies:

Both financial and non-financial companies are subject to an obligation of transparency in their non-financial statements. With regard to the non-financial companies concerned, the Taxonomy Regulation requires undertakings that are subject to an obligation to publish non-financial information pursuant to Article 19a or Article 29a of Directive 2013/34/EU (the "Accounting Directive"), as amended by the NFRD Directive[28], to publish the following Key Performance Indicators (KPIs):

- a) the proportion of their turnover derived from products or services associated with economic activities that qualify as environmentally sustainable (...),
- b) the proportion of their capital expenditure and the proportion of their operating expenditure related to assets or processes associated with economic activities that qualify as environmentally sustainable."

The publication and calculation of the KPIs and of all the information to be provided are specified in the delegated act relating to Article 8 of the Taxonomy Regulation, the text of which was published in the Official Journal of the European Union on 10 December 2021.

Following the recent adoption of the CSRD, a far greater number of companies will be affected: all listed companies, except microenterprises, with the threshold for the number of employees being reduced, for unlisted companies, to 250.

2.3 SANCTIONS AND LIABILITY

The non-financial reporting of companies whose securities are admitted to trading on a regulated market or a multilateral trading system may be subject to sanctions if any false or misleading information is published (2.3.1). The company's institutional or commercial communication may be subject to legal action on the basis of misleading commercial practices (2.3.2), or to action by its competitors on the basis of unfair competition (2.3.3). Lastly, the liability of the companies may be engaged on the basis of the general law of liability (2.3.4). The company may react by taking legal action for denigration (2.3.5).

◆ 2.3.1 Dissemination of false or misleading information by companies whose securities are admitted to trading on a regulated market or a multilateral trading system

Companies whose securities are admitted to trading on a regulated market or a multilateral trading system must provide the markets with a significant amount of ESG-related information, including:

- in their financial report: this includes the management report containing the EFPS and, if applicable, the due diligence plan and its annual report; and also in the "risk factors" section,
- or in respect of their obligation to provide continuous disclosure.

In all cases, the non-financial information must meet the requirements for information provided by issuers to the public, namely that it must be accurate, precise and truthful. In the field of non-financial reporting, the concept of accuracy and precision is of course less stringent than for financial reporting, since there is no single framework applicable to all companies.

If the non-financial information provided misleads the market with regard to the true situation and prospects of an issuer, it could give rise to a sanction by the AMF Enforcement Committee[29] or by the criminal courts if prosecuted by the Parquet National Financier [National Financial Prosecutor's Office][30].

Such sanctions may concern either the company or its executives.

It should be noted that to date, we have not found any sanction imposed by the AMF or by the French courts in relation to non-financial reporting, but the risk of such sanction being imposed in the future cannot be ruled out.

A civil action by investors is also possible (see section 2.3.4).

28 Public interest entities, i.e. mainly listed companies that have, alone or with their consolidated subsidiaries, 500 employees and a balance sheet total of EUR 20 million or a turnover of EUR 40 million, credit institutions and insurance companies, but not unlisted companies with more than 500 employees whose turnover or balance sheet total exceeds EUR 100 million, which fall under over-transposition of the NFRD.

29 On the basis of Article L. 621-15 of the Monetary and Financial Code and Articles 12 § 1 c) and 15 of the EU Market Abuse Regulation (MAR).

30 Pursuant to the provisions of Article L. 465-3-2 of the Monetary and Financial Code.

◆ 2.3.2 Misleading commercial practices

The communication of untruthful CSR data or commitments is likely to constitute a breach of the provisions of Articles L. 121-2 to L. 121-4 of the Consumer Code on misleading commercial practices[31].

These provisions may serve as a basis for criminal or civil action.

The Samsung case

In 2019, Samsung France was investigated for misleading commercial practices due to an alleged violation of the ethical commitments posted on its website[32]. In this case, certain NGOs filed a complaint accusing Samsung of breaching its voluntary ethical commitments on child labour in some of its Asian factories and alleging that Samsung France was therefore misleading consumers by making untruthful statements on its website about the group's consideration of human rights. The original complaint was ultimately ruled inadmissible, putting an end to the investigation, but another complaint filed by the leading French consumer defence organisation 'UFC Que Choisir' is pending.

A civil action was recently brought by environmental organisations against TotalEnergies in relation to its communication of its objectives for combating global warming (read the article published by Le Monde on the subject).

The characterisation of actions as misleading commercial practices presupposes, in particular, that false or misleading claims are made about the essential qualities of a product, the qualities of a professional or the scope of commitments declared by a professional.

The courts have already sanctioned environmental claims[33] on the basis of this characterisation. It is conceivable that it could also be applied to an assertion regarding the observance of certain ethical principles in relation to product manufacturing conditions[34].

Environmental claims

Special attention should be paid to environmental claims that are subject to a swiftly changing legal and regulatory environment. In particular, the Climate and Resilience Law of 22 August 2021 has supplemented the provisions of the Consumer Code on misleading commercial practices, with a specific reference to those based on "environmental claims".

Although it usually involves the use of commercial or advertising material by the "advertiser", it cannot be ruled out that the concept of "advertisement" could be understood more broadly, depending on the context, if reading such claims is likely to influence the consumer's consent at the time of purchase.
The sanctions may be criminal[35] or civil[36].

◆ 2.3.3 Unfair competition

A company's liability can be engaged on the basis of Articles 1240 and 1241 of the Civil Code, which can be used to sanction unfair competition practices if undue advertising of compliance with commitments or of virtuous practices with regard to CSR is such as to give it a competitive advantage over other companies active in the same sector.

Thus, the Court of Cassation has ruled that:
- a company's tort liability may be engaged if it does not comply with the CSR commitments or codes of good conduct referred to in its communication[37],
- and a breach of environmental regulations may constitute an act of unfair competition[38].

◆ 2.3.4 Common-law civil liability related to ESG communication

The communication of false or misleading ESG information or of untrue CSR commitments may constitute an offence engaging the company's civil liability under Articles 1240 et seq. of the Civil Code. It therefore involves the combination of an offence, an injury and a causal link between the two.
In its report of June 2020[39], the Legal High Committee for Financial Markets of Paris recalls various sources of obligations whose violation can serve as a basis for the characterisation of an offence[40].

In the case of a company whose securities are admitted to trading on a regulated market, deficient market information could also be used as grounds for a liability action by shareholders against the issuer or its executives if they consider themselves to be harmed by an injury that they suffer directly from the loss incurred on their investment when an issuer's stock-market price falls following the disclosure of the deficiency of the information[41].

31 Articles L. 121-2 to L. 121-4 of the Consumer Code set out a limitative list of the elements and practices that fall within the scope of this offence.
32 D. G. Martin and D. Dimitrov, Du devoir de vigilance au devoir de communiquer avec vigilance [From the duty of due diligence to the duty to communicate with due diligence], Les Echos, August 2019.
33 CA Paris, Criminal Chamber 13 section A, 9 May 2006: JurisData no. 2006-314102; CA Paris, Chamber 5 section A, 31 January 2007: JurisData no. 2007-340182; CA Lyon, Criminal Chamber 7, 29 October 2008: JurisData no. 2008-371645.
34 CA Douai, 19 May 2005: JurisData no. 2005-278022; Cass. crim., 3 May 2006, no. 05-85.051; CA Agen, 21 June 2007: JurisData no. 2007-342406; CA Aix-en-Provence, Criminal Chamger 5, 3 October 2007: JurisData no. 2007-351355.
35 Articles L. 132-1 to L. 132-9, and in particular L. 132-2, of the Consumer Code lay down the criminal penalties incurred in the event of misleading commercial practice. Finally, Article L. 132-4 of the Consumer Code provides that when the offence is established, the court may order the publication or dissemination of the full sanctioning decision against the company.
36 At the civil level, damages, cessation of the practices and withdrawal of the communications concerned may be demanded.
37 Cass. com., 17 June 1997, no. 95-11.164
38 Cass. com., 21 January 2014, no. 12-25.443
39 Op. cit., p. 23 et seq.
40 In this regard, a parent company's internal documents or a company's internal charter are documents that may be invoked to characterise an offence engaging the company's civil liability. With regard to voluntary commitments, as indicated by the Versailles Court of Appeal in a judgment of 22 March 2013, a breach of these may engage the company's civil liability if they are sufficiently precise.
41 See, with regard to financial information, Cass. com., 6 May 2014, nos. 13-17.632 and 13-18.473: JurisData no. 2014-009959.

◆ 2.3.5 Legal action for denigration

Companies are not without means against third parties whose actions may damage their reputation. In particular, they can take liability action for denigration on the basis of Article 1240 of the Civil Code. However, the conditions for characterising such denigration are not always easy to meet.

The Yuka case[42]:

The recent action taken against Yuka illustrates how the courts may balance, on the one hand, freedom of expression – which includes the freedom to criticise – and, on the other hand, the damage to the company's reputation through denigration, sometimes at the expense of freedom of expression.

In this particular case, a professional association asked the court to find the Yuka app, dedicated to the nutritional scoring of food products, guilty of advising against the consumption of ham because of the allegedly carcinogenic nature of the nitrites that it contains. This advice had resulted in a decrease in consumption of this product.

For the characterisation of denigration, the court used five cumulative conditions[43], showing that this characterisation is not necessarily easy to arrive at. The Yuka app had already been convicted in March 2020 by the Commercial Court of Versailles on the same grounds.

42 T. Com. Paris, May 25, 2021, no. 2021001119.
43 These conditions are as follows:
- an aim of discrediting the products concerned by the disclosure of the information,
- an impact on customer behaviour,
- the inability of the production sector to respond to the contested allegations via the same media with the same means,
- non-limitation of the disclosed information to a contribution only to the debate on a general topic,
- and the existence of a sufficient factual basis of objective observations with regard to the seriousness of the allegations in question and, if such a basis exists, on condition that this information is expressed with a certain moderation.

03

OBLIGATIONS WITH REGARD TO CORPORATE MANAGEMENT AND STRATEGY

Beyond the rules and legal risks associated with the company's ESG communication, the company is also subject to an increasing number of obligations that directly affect its management and strategy. Some of these obligations result from general texts (3.1) and others from special texts (3.2).

3.1 GENERAL TEXTS

◆ 3.1.1 Soft law provisions

3.1.1.1 Corporate governance codes

The soft law provisions arise in particular from corporate governance codes relating to listed companies, mainly the AFEP-MEDEF code and the Middlenext code. These two codes define the rules of good governance with which the companies that refer to them must comply on the basis of the "apply or explain" principle. They are increasingly integrating ESG issues and thus helping to make them more easily taken into account in the formulation of companies' strategic orientation.

The AFEP-MEDEF code provides that:

- the board of directors should "promote long-term value creation by the company by taking into account the social and environmental aspects of its activities"[44],
- any director may, if they deem it necessary, receive training on the issues at stake for the company with regard to social and environmental responsibility[45],
- the remuneration of executives should incorporate one or more criteria related to corporate social and environmental responsibility[46],
- diversity issues (gender representation, nationalities, age, qualifications and professional experience) should be taken into account within the Board and its committees and, with regard to gender balance, more generally within the management bodies,
- a gender-mix policy should be implemented within the management bodies, and the corporate governance report should cover this implementation (on gender issues, see section 3.2.2.1).

More generally, taking CSR into account requires the board of directors to ensure that shareholders receive information from the company that is relevant, balanced and truthful with regard to the company's extra-financial issues. To this end, it must in particular indicate in its annual report the internal procedures that enable it to identify and control the company's off-balance-sheet commitments and significant risks[47].

The Middlenext code, in its revised version of October 2021, further integrates ESG issues by recommending, in particular:

- the establishment of a specialised CSR committee,
- and the implementation at each hierarchical level of the company, over and above the legal requirements and taking the job context into account, of a policy aimed at ensuring gender balance and equity.

3.1.1.2 OECD Guidelines for Multinational Enterprises

Among the many international standards that companies may decide to adhere to (the Sustainable Development Goals, the Global Compact, the Declaration and Conventions of the International Labour Organization, the United Nations Guiding Principles on Business and Human Rights, etc.), the OECD Guidelines have a special place. This is because a breach of them may be subject if not to a sanction, at least to a procedure that could have an impact on the image of the breaching company.

The OECD Guidelines are recommendations for multinational enterprises aimed at promoting responsible conduct in the context of economic, environmental and social progress (A). To this end, national contact points have the task of implementing adequate measures in accordance with these principles, and issue public opinions on alleged breaches of these principles (B).

(A) FOUNDATIONS

Published in 1976 and updated since then, most recently in 2011, the OECD Guidelines for Multinational Enterprises "aim to ensure that the operations of these enterprises are in harmony with government policies, to strengthen the basis of mutual confidence between enterprises and the societies in which they operate, to help improve the foreign investment climate, and to enhance the contribution to sustainable development made by multinational enterprises".

These are recommendations:

- for multinational enterprises operating in or out of OECD member countries,
- inviting them to adopt responsible business conduct in a global context consistent with applicable laws and internationally recognised standards,
- on the publication of information, human rights, employment and industrial relations, environment, anti-corruption, consumer interests, science and technology, competition and taxation.

In addition to its Guidelines, the OECD has published a guide to the duty of due diligence that multinational enterprises must exercise in order to combat the risks of corruption and negative impacts on workers[48], and to ensure respect for human rights[49], preservation of the environment and protection of consumers.

The OECD has published sector-specific guides to the duty of due diligence to be observed by companies in the extractive, agricultural, mining, financial, clothing and textile sectors.

44 Art. 1.1 paragraph 2
45 Art. 13
46 Art. 25.1.1
47 Art. 4.6
48 ILO Conventions 29 and 105.
49 United Nations Guiding Principles on Business and Human Rights, 2011.

(B) NATIONAL CONTACT POINTS

For the purposes of this text, each OECD member country must designate a "national contact point", or NCP. The French NCP is composed of representatives of MEDEF, trade unions and the State.

The NCP contributes to strengthening the effectiveness of the Guidelines by conducting promotional activities and responding to requests for information.

It also participates in the resolution of issues raised by the implementation of the Guidelines, including:

- by examining questions referred to it ("specific circumstances") in relation to activities that may be in breach of the Guidelines and that, as far as the French NCP is concerned, are carried out by French multinational companies[50] in any country, or by foreign companies in France,
- by making the results of the procedures public, after consultation with the parties involved, taking into account the need to protect sensitive information.

Its publications are monitored both by NGOs and by investors.

◆ 3.1.2 Corporate management obligations arising from the PACTE Law

3.1.2.1 Obligations arising from Article 1833 of the Civil Code

Pursuant to Article 1833 of the Civil Code resulting from the PACTE Law, the company must be managed in its social interest, taking into account the social and environmental issues associated with its activity. This obligation is reflected in Articles L. 225-35 and L. 225-64 of the Commercial Code with regard to boards of directors and executive boards. It should be noted that Law no. 2022-296 of 2 March 2022 added that these bodies should also take sporting and cultural issues into consideration; this amendment has been widely criticised and is likely to be abolished with the adoption of a future legislative text.

On this point, reference can be made to the report on the liability of companies and their executives in social and environmental matters of the Legal High Advisory Committee for Financial Markets of Paris, dated 19 June 2020.

Article 1833 of the Civil Code requires, as a minimum, the company's executives to seriously examine in the decision-making process the impact of the social and environmental issues associated with its activity, whether in terms of management or strategy. It should encourage the company and its executives to pay fair and reasonable attention to these issues, from a long-term perspective and taking the interests of all stakeholders into account, with respect to the other considerations to be taken into account in the management of the business.

This is more an obligation of means than an obligation of result[51], but it can nevertheless give rise to:

- liability of executives towards the company[52], based on Articles 1850of the Civil Code and L. 225-251 of the Commercial Code, and more rarely towards third parties[53],
- the dismissal of executives,
- liability of the company towards third parties on the basis of Articles 1240 et seq. of the Civil Code.

The nullity of corporate decisions that would contravene the provisions of the second paragraph of Article 1833 of the Civil Code is expressly excluded by Article 1844-10 of the Civil Code.

Conversely, this new provision offers some protection for executives who wish, in their management, to ensure a real promotion of these issues[54].

Article 25 of the proposal for a directive on due diligence would strengthen the board of directors' obligation to take into account environmental, climate and human rights issues (see section 3.1.3.2).

50 The concept of a multinational enterprise is that used by Article 4 of the Concepts and Principles of the Guidelines, which state in particular that "a precise definition of multinational enterprises is not required for the purposes of the Guidelines. These enterprises operate in all sectors of the economy. They usually comprise companies or other entities established in more than one country and so linked that they may coordinate their operations in various ways". The OECD's annual reports on responsible business conduct contain further details on this point.

51 I. Urbain-Parleani, "La *raison d'être* des sociétés dans le projet de loi PACTE du 19 juin 2018" [The *raison d'être* of companies in the draft PACTE Law of 19 June 2018], Revue des sociétés, 2018, p. 623.

52 See D. Poracchia, "De l'intérêt social à la *raison d'être* des sociétés" [From social interest to the *raison d'être* of companies]", BJS June 2019, no. 119w8, p. 40 and D. G. Martin, "La responsabilité des dirigeants vis-à-vis de la société, de ses actionnaires et du marché en lien avec les enjeux climatiques" [The liability of managers towards the company, its shareholders and the market in relation to climate issues], Cahier de Droit de l'Entreprise no. 4, August 2020.

53 Report on the liability of companies and their executives in social and environmental matters, HCJP, 19 June 2020, p. 59 § 135.

54 See D. Poracchia, "De l'intérêt social à la *raison d'être* des sociétés", BJS June 2019, no. 119w8, p. 40.

3.1.2.2 Obligations linked to the adoption of a *raison d'être* in the articles of association or the quality of mission-driven company

(A) GENERAL PRESENTATION OF THE *RAISON D'ÊTRE* AND THE QUALITY OF MISSION-DRIVEN COMPANY

The PACTE Law also opened up two options for companies that would like to go further in their social, societal and environmental commitments: the ability to include a *raison d'être* or purpose in their articles of association and, for the most committed companies, the possibility of adopting the quality of mission-driven company ("Entreprise à mission")[55].

RAISON D'ÊTRE

Under Article 1835 of the Civil Code, civil and commercial companies alike can insert a *raison d'être* in their articles of association, consisting of "principles that are held by the company and in order to comply with which it intends to allocate resources in the conduct of its activity". Many companies are adopting a *raison d'être* without inserting it in their articles of association.

The *raison d'être* is therefore "the affirmation of the values that the company intends to pursue in the fulfilment of its corporate object"[56], with the idea of specifying, justifying and validating how the company provides real value for its stakeholders and, where applicable, for the environment and the rest of the community.

The *raison d'être* is not limited to setting out the company's values. It sets up a dynamic: resources need to be allocated to it in order to seek to adhere to it ever more closely, starting from an existing situation that is often improvable, and to avoid making decisions that run counter to it.

MISSION-DRIVEN COMPANY

Under Article L. 210-10 of the Commercial Code, commercial companies that meet the following four conditions can publicly claim the quality of "mission-driven company", regardless of their form:

- their articles of association must contain a *raison d'être*,
- their articles of association must set out one or more social or environmental objectives whose pursuit the company adopts as its mission,
- their articles of association must lay down the procedures for the performance and monitoring of the mission, and in particular must provide for a body dedicated to such monitoring, namely an advisory or mission committee that includes at least one employee and prepares a report attached to the management report,
- and lastly, the company must be declared as such to the registry of the commercial court.

In addition, the fulfilment of the mission must be verified by an independent third-party body, which will verify the materiality of the pursuit of the objectives that the company has set itself. Decree no. 2020-01 of 2 January 2020 specified the conditions of intervention of the independent third-party body.

Similar rules exist for cooperative companies, mutual societies and mutual insurance companies.

Nearly three years after the adoption of the PACTE Law, the mission-driven company has achieved some success: to date, the Observatoire des entreprises à mission [Observatory of mission-driven companies] has identified more than 500 of them.

The Rocher report, prepared at the government's request and published in October 2021, suggests a number of ways to foster the development of raisons d'être and mission-driven companies, and in particular to allow them to be adopted as widely as possible and make them more credible in relation to the perceived risk of "purpose washing". It is possible that this report will give rise to a PACTE Law II.

(B) LEGAL RISKS ASSOCIATED WITH THE ADOPTION OF A *RAISON D'ÊTRE* IN THE ARTICLES OF ASSOCIATION OR THE QUALITY OF MISSION-DRIVEN COMPANY

The adoption of a *raison d'être*, and especially of the quality of mission-driven company, may give rise to liability:

- of executives towards the company and its shareholders on the basis of Articles 1850 of the Civil Code and L. 225-251 of the Commercial Code if, by insufficiently taking the *raison d'être* into account, insufficiently pursuing the social and environmental objectives of the mission, or acting in a manner contrary to those objectives, they cause harm to the company[57]. The harm suffered by the company could, in particular, result in:
  - damage to its reputation,
  - or loss of the ability to identify itself as a mission-driven company as provided for in Article L. 210-11 of the Commercial Code[58].
- of the company itself towards third parties on the basis of common-law liability[59].

The authors generally consider that the necessary conditions for the engagement of the liability of the company or its executives will be difficult to establish if the wording of the *raison d'être* is imprecise[60] or non-committal[61], which, in practice, is often the case with the raisons d'être adopted by companies to date. This risk is greater for mission-driven companies, which must pursue the objectives they have set themselves, these being generally more precise than the *raison d'être*.

With regard to the risk of nullity of corporate acts and decisions, which may be imposed as a sanction for the violation of an imperative legal provision, some authors consider that uncertainty remains as to whether it would be possible to invoke violation of the principles of a *raison d'être* in the articles of association in order to seek this sanction[62].

55 See D. Autissier, L. Bretones, E. Jacquillat, D.G. Martin and T. Sibieude, "Entreprises à mission et *raison d'être*, changer l'entreprise pour un monde plus durable" [Mission-driven companies and the *raison d'être* – changing companies for a more sustainable world], Éditions Dunod, p. 43 et seq.

56 Alain Viandier, "La *raison d'être* d'une société" [The *raison d'être* of a company] (Art. 1835 of the Civil Code), BRDA 10/19 of 17 May 2019.

57 For a more detailed discussion, see D. Autissier, L. Bretones, E. Jacquillat, D.G. Martin and T. Sibieude, "Entreprises à mission et *raison d'être*, changer l'entreprise pour un monde plus durable", Éditions Dunod, July 2020.

58 If the independent third-party body finds a failure to pursue the social or environmental objectives that the company has set itself, Article L. 210-11 of the Commercial Code provides that: "the Public Prosecutor or any interested party may refer the matter to the president of the court ruling in summary proceedings in order to demand, under penalty of prosecution where applicable, that the company's legal representative delete the phrase "mission-driven company" from all acts, documents or electronic media put out by the company."

59 A. Viandier, op. cit., no. 45.

60 A. Viandier, "La *raison d'être* d'une société", BRDA 10/19, no. 52.

61 A. Viandier, op. cit., no. 52.

62 See, in particular, P. Schultz, "*Raison d'être* de la société et cause de nullité" [Corporate *raison d'être* and grounds for nullity], Petites affiches no. 006, p. 14.

(C) CONSIDERATION OF THE *RAISON D'ÊTRE* OR MISSION IN THE ASSESSMENT OF SOCIAL INTEREST

The adoption of a *raison d'être* or the quality of mission-driven company raises the question of how far the company's executives can go in taking these into consideration.

Some companies may make decisions that, due to their consistency with their purpose or for the good performance of their mission, create positive externalities or reduce negative externalities at the expense of their apparent interest. One example is companies that decide, with this objective in mind, to abandon profitable activities.

It is desirable for executives to establish a dialogue with their governance and, where appropriate, the shareholders, in order to assess the extent to which the *raison d'être* or the fulfilment of the mission can and should be taken into consideration, while remaining acceptable to the shareholders.

In any event, in assessing a decision's conformity with the social interest, the *raison d'être* or the mission should be taken into account.

(D) LISTED COMPANIES

In the case of listed companies, the *raison d'être* can be invoked by executives to counter a campaign by activist shareholders. It could also serve as a basis for the board of directors' opposition to a takeover bid[63], or dissuade a potential initiator of such a bid, which would be bound by the *raison d'être* unless it succeeded in obtaining the two-thirds of votes that would allow it to amend the articles of association.

This is how the raisons d'être were able to be invoked by the protagonists in the 2020 stock-market battle between Suez and Veolia (see the article published by Le Monde on the subject).

◆ 3.1.3 Duty of due diligence

The duty of due diligence borne by companies was enshrined in domestic law by the Due Diligence Law of 2017 (3.1.3.1). A proposal for a directive on due diligence is expected to be adopted in 2022 (see section 3.1.3.2). The question arises of the recognition in French law of a common-law duty of due diligence (3.1.3.3). Some recent decisions point to a trend in favour of the possible engagement of the parent company's liability due to the actions of its subsidiary (3.1.3.4).

◆ 3.1.3.1 The Due Diligence Law

Law no. 2017-399 on the duty of due diligence for parent companies and order-giving companies of 27 March 2017 (the "Law") is based on the OECD Guidelines. Its provisions are included in Articles L. 225-102-4 and L. 225-102-5 of the Commercial Code.

Scope of application:

The Law applies to companies whose registered office is located in France and which, at the close of two consecutive financial years:

- employ at least 5,000 employees in France (directly or via their subsidiaries),
- or employ at least 10,000 employees worldwide (directly or via their subsidiaries).

Companies must have one of the following legal forms: société anonyme, société en commandite par actions, société par actions simplifiée or Societas Europaea.

This scope is likely to be extended by the Due Diligence Directive (see section 3.1.3.2).

Companies that meet these thresholds, regardless of their activities or turnover, are required to draw up and implement a due diligence plan (the "Plan"), which must contain sufficient measures to identify relevant 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 its subsidiaries, as well as the activities of subcontractors or suppliers with whom an established business relationship is maintained, where those activities are linked to that relationship[64].

What does "human rights" mean for the purposes of this law?

The Law does not define human rights. The parliamentary proceedings refer to French constitutional standards and European and international conventions, including:

- the Universal Declaration of Human Rights of 10 December 1948,
- the International Covenant on Civil and Political Rights of 16 December 1966,
- the European Convention on Human Rights of 4 November 1950,
- the Charter of Fundamental Rights of the European Union of 7 December 2000.

The authors also suggest that reference be made to the OECD Guidelines for Multinational Enterprises, the United Nations Guidelines on Human Rights and the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy.

63 Antoine Gaudemet, "La *raison d'être*, nouvelle défense anti-OPA?" [The raison d'être, a new defence against takeover bids?], Bull. Joly Sociétés Jan. 2019, p. 1.
64 Article L. 225-102-4 of the Commercial Code.

This Plan, which is intended to be drawn up with the assistance of the company's stakeholders, must include:

- a mapping of the risks,
- procedures for assessing the situation of subsidiaries and subcontractors or suppliers,
- appropriate actions for mitigating risks or preventing breaches of human rights or damage to the environment,
- risk alert mechanisms,
- and a mechanism for monitoring the measures taken[65].

The Plan and the record of its effective implementation must be made public and included in the management report.

Possible sanctions:

- Any person with a proven interest can refer the matter to the competent authority in order to serve formal notice on the company concerned to comply with its obligations.
- On expiry of a period of three months following the serving of formal notice, if the company has not complied with its obligations, the court may compel it to do so under penalty of prosecution.
- Failure to comply with the obligations referred to in Article L. 225-102-5 of the Commercial Code "engages the liability of its author and obliges him to remedy the harm that performance of those obligations would have prevented".
- Since Law no. 2021-1104 of 22 August 2021, the Climate and Resilience Law, companies that do not comply with the obligations arising from the duty of due diligence may be excluded from certain public procurement procedures.

The new Article L. 211-21 of the Code of Judicial Organisation[67] assigns competence to the Paris Judicial Court [Tribunal Judiciaire de Paris] for actions relating to the duty of due diligence based on Articles L. 255-102-4 and L. 225-102-5 of the Commercial Code.

Formal notices and actions under way:

Several formal notices and legal actions have already been initiated. Six legal actions are currently under way against French multinationals. One of these alleges that the company is failing to comply with the carbon trajectory provided for in the Paris Agreement, another that the company is contributing to deforestation, and the others that violations of the rights of communities are being committed by their subsidiaries, suppliers or subcontractors. Although some companies have amended their due diligence plans as a result of a formal notice, no decision has been handed down to date.

In addition, an initiative at the French level is also worth mentioning. A draft law aimed at creating a general principle of corporate liability in the event of a failure to comply with laws and business ethics, independently of the duty of due diligence, has been tabled by the MP Philippe Latombe. It provides for the creation of a new Article 1244-1 of the Civil Code, which would stipulate that: "Any company whose economic activity fails to comply with laws and business ethics is obliged to repair the injurious consequences of such failure. This principle applies, irrespective of the company's legal organisation, as long as the company carries out an economic activity on French territory. When the injurious event occurred in France, the victim can choose to refer the matter to the French courts."

Lastly, mention should be made of the existence, since 2014, of an intergovernmental working group, to which the United Nations Human Rights Council has entrusted the task of elaborating an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises – a kind of duty of due diligence on a global scale.

65 Article L. 225-102-4 of the Commercial Code.
67 The Loi pour la confiance dans l'institution judiciaire [Law for trust in the judicial system], which the Constitutional Council considers to be compliant with the Constitution, see Cons. Const., 17 December 2021, Dec. no. 2021-830 DC.

3.1.3.2 The proposal for a directive on corporate sustainability due diligence

This duty of due diligence enshrined in domestic law is currently being discussed at European level. Following a European Parliament resolution in March 2021[70], the European Commission presented on 23 February 2022 a proposal for a directive on corporate sustainability due diligence. This directive proposal aims to enshrine a European duty of due diligence.

Scope of application:

The directive proposal distinguishes between two groups of subject companies[71]:

- Group 1 includes all EU limited liability companies with more than 500 employees and a net worldwide turnover of more than EUR 150 million.
- Group 2 includes all EU limited liability companies operating in high-impact sectors (textile and footwear industry, agriculture, fisheries, agri-food, extraction of mineral resources (oil, gas, coal), manufacture of metal products, etc.) that employ more than 250 employees and have a net worldwide turnover of more than EUR 40 million. However, only those companies whose turnover generated by high-impact activities represents more than 50% of their total turnover would be affected. These companies would have an additional period of two years compared with Group 1 companies to comply with the directive[72].

Third-country companies with a turnover in the European Union of more than EUR 150 million (Group 1), or EUR 40 million if the activity is carried out in a high-impact sector (Group 2), would also be required to comply with the European provisions on due diligence[73].

In view of the lower thresholds considered in the directive proposal, significant numbers of French companies would be required to comply with a duty of due diligence. Although French SMEs are not directly concerned by these measures, they could be affected indirectly. For this reason, the directive proposal provides for support measures in favour of all enterprises, particularly SMEs, which may be indirectly concerned by these provisions. These measures include the development of websites and dedicated platforms or portals, as well as possible financial support for SMEs.

The due diligence duty would cover the activities of the company concerned, its subsidiaries and the companies with which it maintains established business relationships throughout the entire value chain, not only the supply chain.

In order to comply with the duty of due diligence in relation to sustainability, the directive proposal provides that companies must:

- integrate the duty of due diligence into their internal policies and governance. Member States will have to ensure that companies are transparent. A description of the company's long-term approach to this issue and its internal rules, as well as publication of its code of conduct, will be required each year[74].
- identify the actual or potential negative impacts of their activities on human rights and the environment, and prevent or minimise such adverse effects. This will involve, where applicable, the establishment of an action plan with objectives to be achieved on the basis of qualitative and quantitative indicators, or the inclusion in contractual documentation of clauses requiring the commercial partner to comply with the company's code of conduct75,
- take the necessary measures to bring to an end or minimise the actual impacts. Member States will also be able to require the companies concerned to make investments (in terms of management or infrastructure). In cases where a company is unlikely to prevent or minimise the above-mentioned risks of adverse impacts, the text then gives Member States the possibility of demanding that it suspend or terminate a business relationship[76],
- establish and maintain a complaints procedure[77];
- monitor the effectiveness of the policy and due diligence measures[78],
- and publicly communicate on due diligence[79].

70 European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)).
71 Article 2 of the proposal for a directive.
72 Article 30 of the proposal for a directive.
73 Article 2 of the proposal for a directive.
74 Article 5 of the proposal for a directive.
75 Article 6 of the proposal for a directive.
76 Article 7 of the proposal for a directive.
77 Article 9 of the proposal for a directive.
78 Article 10 of the proposal for a directive.
79 Article 11 of the proposal for a directive.

Group 1 companies will be required to have a plan to ensure that their business strategy is compatible with the limiting of global warming to 1.5° C, in line with the Paris Agreement[80].

To ensure that due diligence forms an integral part of corporate governance, the proposal for a directive:

- introduces obligations for executives to establish due diligence procedures and oversee their implementation, as well as to integrate them into the company's strategy,
- provides that when executives fulfil their obligation to act in the best interest of the company, they must consider the consequences of their decisions for human rights, climate and the environment, as well as the long-term impact of each of their decisions,
- provides that companies must also ensure compliance with the requirements of the Climate and Energy Plan when setting any variable remuneration linked to an executive's contribution to the company's business strategy, long-term interests and sustainability.

As regards sanctions, according to the directive proposal States will be free to establish sanctions against infringing companies, including pecuniary sanctions. These may be determined on the basis of a percentage of the infringing company's turnover[81].

Following the model of the German legislation, a national administrative authority designated by each Member State will also be responsible for monitoring compliance with these new rules, and could impose fines for infringements[82].

Victims will also have the possibility of bringing civil liability proceedings for damages that could have been avoided through appropriate due diligence measures[83].

3.1.3.3 Duty of due diligence based on common law

Although relatively few court judgments have been handed down in France in this regard, case law has established, on the basis of Articles 1240 et seq. of the Civil Code, the principle of a due diligence obligation, based on the precautionary principle, borne by certain entities, in particular by certification bodies[84], even though no charge of breaching the rules was made against them. Some authors have inferred from this that the same principle could be extended to breaches of general obligations, based on ethics, social utility or fairness[85].

It should be noted that the existence of a common-law duty of due diligence, or "duty of care", is developing in some jurisdictions. For example, Shell was ordered by a Dutch court in May 2021, on the basis of the "duty of care", to reduce its direct and indirect greenhouse gas emissions (Scopes 1, 2, and 3) by at least 45% by 2030 compared with 2019 levels (see section 3.2.1.4).

On the same basis, two recent Supreme Court judgments in the United Kingdom[86] found against multinational companies having their registered office in the United Kingdom for environmental damage caused by some of their subsidiaries abroad.

It cannot be ruled out that French courts might take inspiration from this case law.

3.1.3.4 Liability of the parent company for the actions of its subsidiaries

(A) CRIMINAL LIABILITY

In a decision of 16 June 2021[87], the Criminal Division of the Court of Cassation extended the scope of the criminal liability of parent companies, which can be engaged on the basis of Article 121-2 of the Penal Code, under which they are criminally liable for "offences committed on their behalf by their organs or representatives". In this case, several employees of one of the subsidiaries of a group's holding company had paid commissions to public officials.

Convicted of active corruption of a foreign public official by the Paris Court of Appeal[88], the holding company argued that the employee of a subsidiary could not be a representative of the parent company, within the meaning of Article 121-2 of the Penal Code, in the absence of a delegation of powers to that employee.
However, the Criminal Division considered that employees of a subsidiary of the parent company can be considered to be representatives of the parent company within the meaning of Article 121-2 of the Penal Code and incur criminal liability on the basis of the group's organisation by business divisions, regardless of the absence of a legal link or a delegation of powers to them.

While this solution is explained by a particular factual context, it remains eminently contestable under Article 121-2 of the Penal Code.

Having firmly demanded that the courts of first instance determine precisely the organ[89] or representative of the legal person through whose intermediary the criminal liability of that legal person is held to exist[90], the Criminal Division now appears to be relaxing its interpretation of the very concepts of "organ" or "representative" of parent companies.

80 Article 15 of the proposal for a directive.
81 Article 20 of the proposal for a directive.
82 Article 17 and 18 of the proposal for a directive.
83 Article 22 of the proposal for a directive.
84 Civ. 1re, 10 October 2018, no. 15-26.093, no. 16-19.430, no. 17-14.401.
85 M. Bacache, Prothèse PIP: liability due to fault by certification bodies, JCP G, no. 48, 26 November 2018.
86 Royal Dutch Shell plc and another v. Okpabi and others [2021], UKSC 3; Vedenta Ressources plc and another v. Lungowe and others [2019], UKSC 20.
87 Crim., 16 June 2021, no. 20-83.098, published in the Bulletin.
88 CA Paris, Pôle 5 - Ch. 13, 15 May 2020, no. 18/03310.
89, Crim., 14 March 2018, no. 16-82.117.
90 Crim., 6 September 2016, no. 14-85.205; Crim., 17 October 2017, no. 16-87.249.

(B) CIVIL LIABILITY

At civil level, it is possible to wonder about the possibility of a parent company being held liable for the undiligent actions of one or more of its direct or indirect subsidiaries, including in relation to CSR issues. The extension of civil liability to the shareholder, already encountered in relation to a company in difficulty under certain conditions, could arise in other circumstances.

In principle, such civil liability is excluded in French law because of the autonomy of legal persons, which means that a legal person cannot be held liable for the actions of another legal person, even if that other legal person is its subsidiary.

It is conceivable that case law could become more favourable to the engagement of a parent company's civil liability due to the actions of a subsidiary[91].

Such an extension would echo an observable trend in case law in other jurisdictions. For example, two recent Supreme Court decisions in the United Kingdom[92] opened up the possibility for non-British complainants to pursue multinational companies having their registered office in the United Kingdom before the English courts for acts committed abroad by their non-British subsidiaries, in this case for environmental damage, under certain conditions relating in particular to the manner of exercise of control of such subsidiaries.

In the judgment handed down against oil company Shell (see section 3.2.1.4), the court of The Hague found the holding company liable on the grounds that the group's policy was formulated at that level.

Moreover, French corporate case law itself does contain some instances of parent companies' liability being engaged in the event of a contractual breach by their subsidiaries in their employer-employee relationship, where that breach is the result of misconduct on the part of the parent company[93].

Lastly, it should be noted that the Environmental Code contains a special provision concerning the liability of parent companies for the rehabilitation of sites that have been used for the operation of a facility classified for the protection of the environment (ICPE) (Article L. 512-17 of the Environmental Code).

3.2 SPECIAL TEXTS

Numerous special texts govern the company's management obligations with regard to environmental issues (3.2.1), social and societal issues (3.2.2) and compliance (3.2.3) issues.

◆ 3.2.1 Environmental issues

The body of environmental law includes, in addition to the provisions of the Environment Code and certain provisions of the Planning Code, the Charter for the Environment (3.2.1.1) and the rules laid down by the Civil Code on ecological damage (3.2.1.2).

Corporate management is also affected by the strengthening of environmental criminal sanctions by the laws of 24 December 2020 and 22 August 2021 (Climate and Resilience Law) aimed at providing better protection for the different environments (water, air, soil) (3.2.1.3). It is worth giving particular consideration to the case of climate-related lawsuits (3.2.1.4).

The Climate and Resilience Law has also strengthened the employer's environmental obligations (3.2.1.5).

3.2.1.1 Charter for the Environment

The Charter for the Environment was incorporated into the corpus of constitutional norms on 1 March 2005[94].

The Charter for the Environment establishes a number of rights, such as "the right to live in a balanced and healthy environment"[95], but also some obligations.

In particular, the Charter provides in Articles 2, 3 and 4 that:
- "Every person has a duty to take part in the preservation and improvement of the environment",
- "Every person must, under the conditions laid down by law, prevent any damage that they might cause to the environment or, failing that, limit the consequences of such damage",
- "Every person must contribute to the repair of any damage that they cause to the environment, under the conditions laid down by law".

The use of the subject "every person" makes it possible to encompass public and private persons, as well as natural and legal persons, without distinction[96].

The direct invocation by court judges of the Charter for the Environment and, more particularly, of its Article 2, in future lawsuits related to health and the environment can therefore be anticipated, and may be reinforced by the invocation of Article 1833 of the Civil Code (see section 3.1.2.1).

91 Report on the liability of companies and their executives in social and environmental matters, Legal High Advisory Committee for Financial Markets of Paris, 19 June 2020, p. 135.
92 Royal Dutch Shell plc and another v. Okpabi and others [2021], UKSC 3; Vedenta Ressources plc and another v. Lungowe and others [2019], UKSC 20.
93 Cass. soc., 24 May 2018
94 The recognition of the full value of the Charter for the Environment was gradual: first by the Constitutional Council, which, in its GMO decision of 19 June 2008, stated that "all rights and obligations defined in the Charter for the Environment have constitutional value", then by the Council of State a few months later in its Order of 3 October 2008, Commune of Annecy.
95 Art. 1 of the Charter for the Environment.
96 In 2011, the Constitutional Council recognised in Article 1 of the Charter a normative scope in connection with its Article 2 in order to identify the existence of an obligation of "environmental due diligence" applicable to all public and private persons, and not only to the public and administrative authorities in their respective areas of responsibility.

However, it is mainly through the priority issue of constitutionality that the Charter for the Environment and the rights that it guarantees have taken on and are taking on their full force in the field of environmental law[97].

3.2.1.2 Ecological damage pursuant to Articles 1246 et seq. of the Civil Code

Following the judgment handed down in the Erika case[98], the Law of 8 August 2016[99] introduced the concept of ecological damage into Articles 1246 to 1252 of the Civil Code.

Article 1246 of the Civil Code now provides that: "Every person responsible for ecological damage is required to repair such damage". Ecological damage is defined in Article 1247 of the Civil Code as "significant damage to the elements or functions of ecosystems or to the collective benefits obtained from the environment by humans".

Although the environmental liability will be borne by the operator whose activity is responsible for the damage caused to the environment, the applicant will need to provide proof of significant damage[100].

As things currently stand, legal action for the reparation of ecological damage is open only to the French Office for Biodiversity, the State, the regional authorities and their groups whose territory is concerned, as well as to public establishments and associations approved or established for at least five years at the date of the commencement of the proceedings whose object is the protection of nature and preservation of the environment.

3.2.1.3 Strengthening of environmental criminal sanctions by the Law of 24 December 2020 and the Climate and Resilience Law

The stated objective of the Law of 24 December 2020 on the European Public Prosecutor's Office, environmental justice and specialised criminal justice was to strengthen the criminal justice response to environmental crimes.

To this end, the Law provides for:
- the creation, within the jurisdiction of each court of appeal, of a regional centre specialising in environmental damage,
- the creation of a Judicial Public Interest Agreement on environmental matters[101], an alternative measure to prosecution that allows the public prosecutor to offer a legal person accused of certain environmental crimes the benefit of an agreement that extinguishes the public action against them, in exchange for the satisfaction and fulfilment of certain obligations.

The Climate and Resilience Law strengthens the criminal justice arsenal by introducing new offences relating to environmental matters:
- the offence of causing damage to environments (water and air), in manifestly deliberate breach of a particular obligation of prudence or safety (Article L. 231-1 of the Environment Code),
- the offence of soil pollution, in the form of abandoning or depositing waste or of managing such waste without complying with the requirements laid down by the competent administrative authorities (Article L. 231-2 of the Environment Code),
- the new offence of ecocide. This new offence consists in intentionally committing the previous offences where, with regard to the offence referred to in Article L. 231-2 of the Environment Code, this causes serious and lasting damage to health, flora or fauna or to air, soil or water quality (Article L. 231-3 of the Environment Code).

Lastly, with regard to the reparation of any damage caused to the environment, the Climate and Resilience Law introduced a new additional penalty allowing the convicted person to be required to rehabilitate the natural environment[102].

3.2.1.4 Climate-related lawsuits

Climate-related lawsuits have increased considerably in recent years, but they are mainly directed against States. In Europe, there have been successive findings against States in the Netherlands (Urgenda judgment of 20 December 2019), in France (Grande-Synthe judgment, CE of 19 November 2020, no. 427301) and in Germany (Karlsruhe court judgment of 29 April 2021).

The actions taken around the world against companies with a view to obtaining a conviction for damages linked to their past emissions have so far failed, having been unable to demonstrate a causal link between damage and any possible wrongdoing.

Today, climate-related lawsuits against companies are increasingly being based on the obligation to comply for the future with an obligation to reduce greenhouse gas emissions, generally based on the Paris Agreement.

97 In this regard, although all the articles of the Charter have constitutional value, they do not all establish a right or a freedom guaranteed by the Constitution, and in accordance with Article 61-1 of the Constitution, the Constitutional Council draws on its case law to compile the list of those that do: thus, although Articles 1, 2 or 7 (the ones most frequently invoked via the QPC [question prioritaire de constitutionnalité, priority application for a preliminary ruling on constitutionality]) establish such a right for the Constitutional Council, the Council was able to state that to date it considered that Article 6 of the Charter, under which "public policies must promote sustainable development", established no rights or guarantees and therefore could not usefully be invoked via the QPC procedure. On the other hand, in its decision of 31 January 2020, the Constitutional Council considered for the first time that the preamble of the Charter could be invoked in the context of a QPC, and that the consequence of this was that the protection of the environment, the common heritage of human beings, now constitutes an objective with constitutional value that it is up to the legislator to reconcile with other rights and freedoms, particularly the freedom to engage in business resulting from Article 4 of the 1789 Declaration of the Rights of Man and of the Citizen.
98 Cass. crim. 25 September 2012 no. 10-82.938 FP-PBRI: Bull. crim. no. 198; solution reiterated by Cass. crim. 22 March 2016 no. 13-87.650 FS-PBI.
99 Law no. 2016-1097 of 8 August 2016 for the Recovery of Biodiversity, Nature and Landscapes.
100 On the compliance with the Constitution of limiting reparation to cases of significant damage only, see Constitutional Council, 5 February 2021, no. 2020-881 QPC.
101 See JN Clement, "Quel avenir pour la convention judiciaire d'intérêt public en environnement?" [What future for the judicial public interest agreement in the environmental field?], Les cahiers de droit de l'entreprise no. 3, June 2021.
102 Article L. 231-4 of the Environment Code.

It should be noted in this regard that the new proposal for a directive on corporate sustainability due diligence (see section 3.1.3.2) provides for certain large companies (those with more than 500 employees and a turnover of more than EUR 150 million) to be required to adopt a plan aimed at ensuring that their business strategy is compatible with the limiting of global warming to 1.5° C, in line with the Paris Agreement.

It was on the basis of the provisions of the Charter for the Environment (particularly its Article 2 establishing a general obligation of environmental due diligence, (see section 3.2.1.1) and of the French Due Diligence Law that the first climate-related lawsuit in France against a company, in this case Total, was brought in January 2020 by several regional authorities and NGOs. The plaintiffs consider that the company does not take the appropriate measures in its due diligence plan to limit the effects of its activity on the climate. They therefore call on the court to order Total to recognise the risks generated by its activities, and to align itself with a trajectory compatible with the limiting of global warming to 1.5° C. This case is still in progress.

The Shell decision: order to comply with the Paris Agreement on the basis of the duty of care

In addition, and for the first time, in May 2021 a company was found against in a climate-related lawsuit, based on the "duty of care," a concept very close to a common-law duty of due diligence.

After being served with formal notice, the oil company Shell was sued by six NGOs and some Dutch citizens before the court of The Hague in the Netherlands. The plaintiffs complained that the Shell Group's commitments in its policy to reduce greenhouse gas emissions were insufficient.

Together with the companies of its group, Shell was ordered by the court to reduce its direct and indirect greenhouse gas emissions (Scopes 1, 2 and 3) by at least 45% by 2030 compared with 2019 levels. The court considered that the reduction obligation is (i) an obligation of result for the activities of the Shell group and (ii) a significant best-efforts obligation with regard to the Shell group's business relations, including end-users (scope 3).

This decision has been criticised, particularly for the way in which it uses certain soft-law principles of respect for human rights, and also for considering that a company is required to reduce its emissions under the terms of the Paris Agreement even though companies are not party to that agreement. Shell has appealed this decision.

If the French courts come to recognise a common-law duty of due diligence, based on Article 1240 of the Civil Code and/or the combined provisions of the Charter for the Environment, justifying an obligation to act in accordance with the requirements of the Paris Agreement, and decide to draw inspiration from the judgment delivered in the Shell case, a very large number of companies could be concerned. This would not be confined to companies subject to the Due Diligence Law (whose number is likely to increase with the imminent EU directive on due diligence).

3.2.1.5 Environmental obligations of the employer

The Climate and Resilience Law was also aimed at ensuring greater involvement of staff representatives in the ecological transition.

(A) COLLECTIVE BARGAINING

The three-year negotiation on the forward planning of employment and skills [Gestion Prévisionnelle de l'Emploi et des Compétences – GPEC] must now respond to the challenges of the ecological transition[103].

(B) REPORTING TO AND CONSULTATION WITH THE CSE [Comité Social et Economique, Social and Economic Committee]

In addition, the Climate and Resilience Law made the preservation of the environment one of the advisory functions of the CSE for companies with 50 or more employees.

As part of its general functions, the CSE must now be informed and consulted about the "environmental consequences" of the measures envisaged by the employer with regard to the organisation, management and general running of the company[104].

Similarly, as part of its "recurring" functions[105], the CSE must now be informed (not consulted) about the "environmental consequences of the company's activities".

103 Article L. 2242-20 of the Labour Code.
104 Article L. 2312-8, III of the Labour Code.
105 These consist of annual information/consultation about the company's strategic orientations, economic and financial situation and social policy.

To assist the CSE in obtaining and understanding the information, the Law provided for:

- extension of the Economic and Social Database (BDES), which becomes the "Economic, Social and Environmental Database" (BDESE)[106],
- extension of the prerogatives of the CSE's accountant. The Law now provides that the accountant's mission covers all the economic, financial, social "or environmental" elements necessary to understand the company's strategic orientations[107],
- and extension of the training of the CSE's elected officials to include environmental issues.

The extension of the prerogatives of staff representatives in relation to environmental issues undoubtedly now allows them to refer such issues to a judge if the employer is insufficiently active in this regard. It would be detrimental if the referral by the trade union organisations to the interim relief judge could be made in order to have a reorganisation project suspended until the employer has sufficiently identified and averted the environmental risks of its project (on the model of what the court had found with regard to the prevention of psychosocial risks[108]).

In this regard, it can only be recommended that employers, from now on, tackle environmental issues in close cooperation with staff representatives, with an emphasis on dialogue and collective bargaining in relation to these issues.

◆ 3.2.2 Social and societal issues

3.2.2.1 Gender balance

(A) EQUAL PAY FOR MEN AND WOMEN

Law no. 2018-771 of 5 September 2018 on the freedom to choose one's professional future introduced the obligation for companies employing 50 or more employees to annually publish information on gender pay gaps and on the actions taken to eliminate such gaps[109].

These companies are thus required to annually calculate their index of occupational gender equality, on the basis of specific indicators and according to a precise calculation methodology. The index is calculated based on a number of points out of 100 for four to five indicators depending on the size of the company's workforce (more or fewer than 250 employees)[110].

These indicators are as follows:

- the gender pay gap calculated on the basis of the average earnings of women compared with men by age group and category of equivalent jobs,
- the gender gap in the rate of individual pay increases that do not correspond to promotions,
- the gender gap in promotion rates,
- the percentage of employees who received a pay increase in the year following their return from maternity leave, if increases occurred during the period during for the leave was taken,
- and the number of employees of the under-represented gender among the 10 employees who received the highest pay.

The company's level of performance and the results achieved for each indicator must then be:

- published on the company's website (on an annual basis not later than 1 March of each year), if it has one, in a visible and readable manner,
- published in the company's Economic, Social and Environmental Database (BDESE) so that it is accessible to members of the Social and Economic Committee (CSE)[111],
- filed with the Ministry of Employment (DREETS) via a form accessible online[112].

A number of actions are required of the company when the results obtained fall below certain thresholds (75 and 85), including corrective measures and their publication.

Sanctions:

- If the data is not published, the company is liable to a pecuniary sanction of up to 1% of its French total payroll for the period during which it failed to meet its obligations.
- At the end of a three-year period, if the company's score is still below 75 points out of 100, the company is then liable to a penalty equal to 1% of its total payroll.

106 Article L. 2312-18 of the Labour Code.
107 Article L. 2315-87-1 of the Labour Code, Article L. 2315-89 of the Labour Code, Article L. 2315-91 of the Labour Code.
108 "As part of its obligation to prevent occupational risks, it is the employer's responsibility, prior to a reorganisation, to identify the risks, including psychosocial risks, that may be brought about by the new organisation that it intends to implement, and then to set out the means of prevention in the support provided to the employees concerned. For a reorganisation involving job cuts and criticised for creating an excessive workload for many managers, these risks can only be identified in the light of quantitatively precise documents with regard to the transfer of workload from the cut jobs to the employees remaining in office. The communication of these documents is the responsibility of the employer, which is the only party in a position to hold them. Pending this communication, it is appropriate to order the suspension of the implementation of the reorganisation project and of any measures taken for its application, including those likely to lead to the termination of employees' employment contracts" (CA Paris, 13 December 2012, no. 12-00303).
109 Article L. 1142-8 of the Labour Code.
110 Articles D. 1142-2 and D. 1142-2-1 of the Labour Code.
111 Article D. 1142-5 of the Labour Code.
112 Article D. 1142-5 of the Labour Code.

Lastly, the Labour Code now provides that in companies employing at least 1,000 employees for the third consecutive financial year, the employer must annually publish any gender representation gaps among senior managers in terms of worked hours, on the one hand, and among the members of the governing bodies defined in Article L. 23-12-1 of the Commercial Code, on the other. These gaps in representation must be made public on the website of the Ministry of Employment[113].

(B) GENDER BALANCE ON BOARDS OF DIRECTORS AND SUPERVISORY BOARDS

With regard to corporate governance, the Commercial Code requires a balanced gender representation on boards of directors and supervisory boards[114].

Companies whose securities are listed on a regulated market, as well as large and medium-sized public limited companies and partnerships limited by shares (i.e. those that for the third consecutive year, on average, employ at least 250 permanent employees and have a net turnover or balance sheet total of at least EUR 50 million) must meet a minimum quota of 40% of each gender on boards of directors and supervisory boards. In some cases, the composition of the board of directors must be described in the company's management report[115].

Failure to comply with this obligation may result in two types of sanctions: (i) nullity of the appointment of the director or supervisory board member made in breach of the provisions set out above and not having the effect of correcting the irregularity in the composition of the body in question[116], and (ii) suspension of payment of the directors' remuneration[117].

(C) PROVISIONS OF THE PACTE LAW IN FAVOUR OF BALANCED REPRESENTATION IN THE MANAGEMENT BODIES

In addition, the PACTE Law has also helped to improve gender balance in companies and provides, in particular, that:

- If the board of directors appoints one or more natural persons to assist the chief executive officer, with the title of deputy chief executive officer, it must determine a selection process for this purpose that ensures the presence of at least one person of each sex among the candidates until the end of the process. These nominations must strive to achieve a balanced gender representation[118],
- the composition of the board must strive to achieve a balanced gender representation[119].

(D) GENDER BALANCE ON GOVERNING BODIES

Law no. 2021-1774 aimed at accelerating economic and professional equality (the "Rixain Law") was passed on 24 December 2021, and provides an obligation of gender balance on governing bodies.

Since 1 March 2022, the Labour Code therefore requires, in companies employing at least 1,000 employees for the third consecutive financial year, the proportion of persons of each sex among senior managers in terms of worked hours and among the members of the governing bodies defined in Article L. 23-12-1 of the Commercial Code to be no less than 30%[120].

Under Article L. 23-12-1 of the Commercial Code: "any body set up within the company, by any act or corporate practice, for the purpose of regularly assisting the executive bodies in the performance of their duties shall be considered a governing body".

In future, companies that do not meet this requirement of gender balance on their governing bodies will also have to comply with the following obligations:

- From 1 March 2026, the negotiation on occupational equality must focus on appropriate and relevant corrective measures. In the absence of any agreement providing for such measures, the measures must be determined by a decision of the employer, following consultation with the company's Social and Economic Committee. The decision must be filed with the administrative authority, which may make observations on the measures provided for in the agreement or the employer's decision, which must be submitted to the body responsible for the management or supervision of the company and to the company's social and economic committee[121].
- From 1 March 2029, these companies will have a period of two years in which to bring themselves into compliance. After one year, the company must publish progress targets and the corrective measures adopted. On expiry of this period, if the results obtained are still below the set level, the employer may be subject to a financial penalty equal to 1% of its total payroll[122].

The corporate governance codes also contain provisions for gender balance on management bodies (see section 3.1.1.1).

113 Article L. 1142-11 of the Labour Code.
114 According to the information report on the evaluation of the implementation, ten years after its adoption, of the Copé-Zimmermann Law of 27 January 2011 on balanced gender representation on boards of directors and on supervisory boards, published by the Senate, this law has made it possible that "France today is a world leader in terms of the feminisation of boards of directors of large listed companies, with more than 46% women in 2021, far ahead of Norway, Italy, Sweden, Finland, Germany or the United States. Moreover, in ten years, this proportion has more than tripled in France." (Information Report on the evaluation of the implementation, ten years after its adoption, of the Copé-Zimmermann Law of 27 January 2011 on balanced gender representation on boards of directors and on supervisory boards, published by the Senate on 8 July 2021.)
115 Article L. 225-18-1 of the Commercial Code.
116 Articles L 225-18-1, L. 225-69-1 and L. 226-4-1 of the Commercial Code.
117 Article L. 225-45 of the Commercial Code.
118 Article L. 225-53 of the Commercial Code.
119 Article L. 225-58 of the Commercial Code.
120 Article L. 1142-11 of the Labour Code.
121 Article L. 1142-13 of the Labour Code, which will enter into force from 1 March 2026.
122 Article L. 1142-12 of the Labour Code, which will enter into force from 1 March 2029.

(E) OTHER EMPLOYMENT LAW PROVISIONS ON GENDER BALANCE

French employment law provides other obligations for companies in relation to occupational equality. These include the following:

- the conclusion of a company agreement or the implementation of an action plan at company level[123]: in companies where one or more branches of representative trade unions are established, the employer must enter, at least once every four years, into negotiations on a company agreement on occupational gender equality that includes measures relating to the elimination of pay gaps and to quality of working life[124],
- in the event of a failure of these negotiations, the employer must unilaterally draw up an action plan on gender equality each year, setting out objectives and measures to achieve them. In the event of non-compliance with this obligation, the company is liable to a penalty equal to 1% of its French total payroll for the period during which it failed to meet its obligations[125],
- in companies with at least 50 employees, consultation with the CSE on occupational equality in the context of its annual consultation on the company's social policy, working conditions and employment[126].

Lastly, the employer may implement measures in favour of women aimed at rebalancing their place in their company, within the framework of a plan for occupational equality[127]. The adoption of such a plan is not compulsory, but may give rise to the payment of State financial assistance under the Contrat pour la mixité des emplois et l'égalité professionnelle [Contract for gender equality and diversity in the workplace].

3.2.2.2 Promotion of diversity

(A) DISABILITY

With regard to disability in the workplace, French employment law provides that measures implemented in favour of disabled employees and aimed at promoting equal treatment do not constitute discrimination[128]. Companies with at least 20 employees are required to employ people with disabilities in the proportion of 6% of their total workforce[129]. If the employer does not achieve this level, it is liable to pay a contribution to Agefiph, calculated based on the shortfall of disabled workers in the company multiplied by 400 times the gross hourly SMIC [salaire minimum interprofessionnel de croissance, minimum interprofessional growth wage] for companies with 20 to 249 employees, 500 times the gross hourly SMIC for companies with 250 to 749 employees, and 600 times the gross hourly SMIC for companies with 750 or more employees[130].

(B) COMBATING DISCRIMINATION

(I) DEFINITION

Discrimination refers to a situation in which one person is treated less favourably than another in a comparable situation because of one of the distinctive criteria set out in Article L. 1132-1 of the Labour Code. It should be noted that there are two types of discrimination, which may be[131]:

- direct: a situation where one person is treated less favourably than another is, has been or would be treated in a comparable situation,
- or indirect: this corresponds to a provision, criterion or practice that is apparently neutral but that would, for one of the reasons stated below, put some persons at a particular disadvantage compared to other persons, unless this provision, criterion or practice is objectively justified by a legitimate aim and the means for achieving that aim are necessary and appropriate.

(II) DISCRIMINATORY GROUNDS

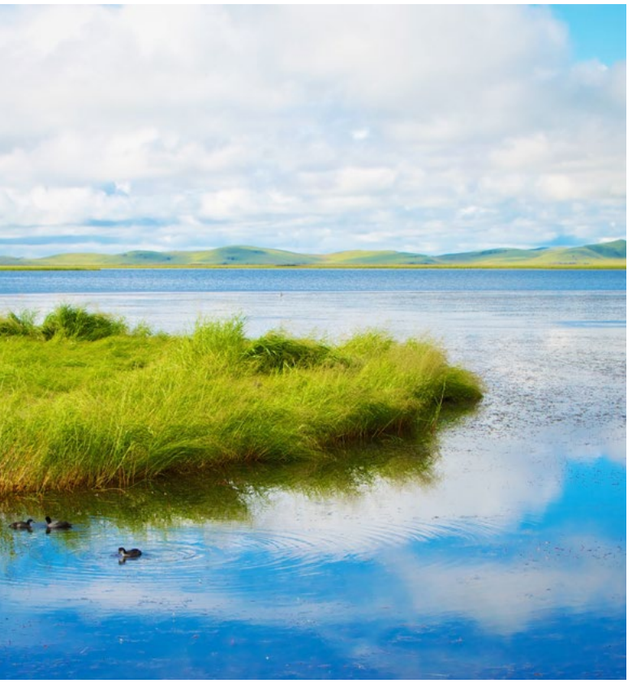
The Labour Code provides a limitative list of discriminatory grounds that are prohibited under employment law. This list includes origin, sex, lifestyle, sexual orientation, gender identity, age, family situation or pregnancy, actual or supposed belonging or non-belonging to an ethnic group, nation or alleged race, trade union or mutualist activities, religious beliefs, physical appearance, health status, loss of autonomy or disability. The exercise of the right of whistleblowing or the fact of having witnessed discriminatory acts also constitute one of these grounds[132].

123 Article L. 2242-1 of the Labour Code.
124 Article L. 2242-1 of the Labour Code.
125 Article L. 2242-3 of the Labour Code.
126 Article L. 2312-26 of the Labour Code.
127 Articles L. 1143-1 et seq. of the Labour Code.
128 Article L. 1133-4 of the Labour Code.
129 Article L. 5212-2 of the Labour Code.
130 Article D. 5212-20 of the Labour Code.
131 Law no. 2008-496 of 27 May 2008 on various provisions for adaptation to Community law in the field of the fight against discrimination.
132 Article L. 1132-3 of the Labour Code.

However, differences in treatment are allowed when they "satisfy an essential and decisive professional requirement and provided that the objective is legitimate and the requirement is proportionate"[133].

Within this framework, the permitted differences in treatment may consist of the implementation of specific measures based on:
- the age of employees[134],
- the disability of employees[135],
- economic vulnerability and place of residence[136].

(III) ACTORS IN COMBATING PAY DISCRIMINATION
In the field of employment law, there are many actors in the fight against discrimination besides the employees. They include the Inspection du Travail [Labour Inspectorate][137], the Défenseur des Droits [Defender of Rights][138], trade union organisations[139], associations duly constituted for at least five years to combat discrimination or working in the field of disability[140], and the members of the CSE.



(IV) SANCTIONS
The sanctions for discrimination may be civil and involve the award of damages, including for moral injury[141], the claiming by the employee of constructive dismissal with immediate effect, application for judicial termination of the employment contract, and invalidity of the discriminatory measure concerned[142].

The sanctions for discrimination may also be criminal in nature[143].

(C) HARASSMENT
As part of its safety obligation, the employer must prevent any behaviour that violates the dignity of employees in their workplace, including any behaviour committed by one of its employees that constitutes bullying or sexual harassment.

(I) MENTAL HARASSMENT
The concept of "harassment" is defined at European and national level.
The European Directive defines it as "where an unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment"[144].

At national level, mental harassment is prohibited by:
- the Labour Code: "No employee shall be subjected to repeated acts of mental harassment having the purpose or effect of degrading their working conditions that may violate their rights and dignity, impair their physical or mental health or jeopardise their professional future"[145],
- the Penal Code: "Harassment of another person through repeated remarks or behaviours having the purpose or effect of degrading their working conditions that may violate their rights and dignity, impair their physical or mental health or jeopardise their professional future is punishable by two years' imprisonment and a fine of EUR 30,000"[146].

(II) SEXUAL HARASSMENT
The concept of "sexual harassment" has also been defined at European and national level.
The European Directive defines it as "where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment"[147].

133 Article L. 1133-1 of the Labour Code.
134 Article L. 1133-2 of the Labour Code.
135 Article L. 1133-3 of the Labour Code.
136 Articles L. 1133-5 and L. 1133-6 of the Labour Code.
137 Article L. 8112-2 of the Labour Code.
138 Org. Law no. 2011-333, 29 March 2011, Arts. 18 to 22: JO, 30 March; D. no. 2011-904, 29 July 2011: JO, 30 July.
139 Article L. 1134-2 of the Labour Code.
140 Article L. 1134-2 of the Labour Code.
141 Article L. 1235-3-1 of the Labour Code.
142 In terms of compensation: either (i) reinstatement of the employee with payment by the employer of an amount equal to the total amount of the injury suffered during the period between their dismissal and their reinstatement, up to the amount of the wages of which they were deprived, and possibly damages for moral injury; or (ii) in the absence of reinstatement, payment of a sum of compensation for invalid dismissal at least equal to the last six months' wages, payment of compensation for breach of the employment contract, and possibly damages in respect of moral injury (Article L. 1232-4 of the Labour Code).
143 The Penal Code provides for the following sanctions: (i) three years' imprisonment and a fine of EUR 45,000 for the natural person employer and (ii) a fine of EUR 225,000 for the legal person in the event of discrimination at the time of hiring, during the execution or at the time of the breach of the employment contract (Articles 225-2 and 225-4 of the Penal Code).
144 Directive 2002/73/EC of 23 September 2002 on equal treatment for men and women.
145 Article L. 1152-1 of the Labour Code.
146 Article 222-33-2 of the Criminal Code.
147 Directive 2002/73/EC of 23 September 2002 on equal treatment for men and women.

At national level, sexual harassment is prohibited by:
- the Labour Code: "No employee shall be subject to acts:

1- of sexual harassment, consisting of repeated remarks or acts of a sexual nature that violate their dignity because of their humiliating or degrading content or create an intimidating, hostile or offensive situation for them;

2- assimilated to sexual harassment, consisting of any form of serious pressure, even if not repeated, exercised with the perceived or real aim of obtaining sexual favours for the author's own benefit or the benefit of a third party."[148]

From 31 March 2022, sexual harassment will also exist (i) when an employee experiences such remarks or behaviours from several persons, in a concerted manner or at the instigation of one of them, even though none of those persons has acted repeatedly, and (ii) when an employee is subjected to such remarks or behaviours successively from several persons who, even in the absence of any concert between them, know that those remarks or behaviours characterise a repetition[149].

- the Penal Code: "I.- Sexual harassment consists of subjecting a person to repeated remarks or acts of a sexual nature that violate their dignity because of their humiliating or degrading content or create an intimidating, hostile or offensive situation for them.

The offence also exists:

1- When a victim is subjected to such remarks or behaviours from several persons, in a concerted manner or at the instigation of one of them, even though none of those persons has acted repeatedly;

2- When a victim is subjected to such remarks or behaviours successively from several persons who, even in the absence of any concert between them, know that those remarks or behaviours characterise a repetition.

II.- Any form of serious pressure, even if not repeated, exercised with the perceived or real aim of obtaining sexual favours for the author's own benefit or the benefit of a third party shall be assimilated to sexual harassment."[150]

148 Article L. 1153-1 of the Labour Code.
149 Law no. 2021-1018 of 2 August 2021.
150 Article L. 222-33 of the Penal Code.

(III) THE EMPLOYER'S OBLIGATIONS OF PREVENTION
In the event of a proven situation of harassment or sexual harassment, the employer shall be considered to have met its obligation to protect employees' health if it demonstrates that it has taken:
- actions to prevent occupational risks, information and prevention actions, and put in place an appropriate organisation and means in relation to harassment[151],
- and all immediate measures to stop the harassment as soon as the employer was informed of the existence of facts liable to constitute harassment[152].

In practice, the Court of Cassation considers that the employer must, in particular, carry out an investigation after the reporting of any harassment by an employee, even if the facts are unproven[153].

Two types of investigation may be put in place:
- an internal investigation carried out by relevant departments (e.g. human resources department, ethics department, etc.),
- an investigation carried out by an external firm. In this case, the parties involved will be given a hearing and a report will be drawn up.

(IV) THE SANCTIONS
The penalties may be civil: the employee who is the victim of harassment may claim constructive dismissal with immediate effect, or apply to the labour court judge for judicial termination of their employment contract due to the employer's fault, and thus obtain the invalidity of the breach of their employment contract, demand reinstatement[154] or, in the absence of reinstatement, demand the payment of compensation[155], including for moral injury.
The sanctions for harassment may also be criminal in nature[156].

◆ 3.2.3 Compliance issues

Compliance can be described as "the set of processes intended to ensure that a company, its executives and employees comply with the legal and ethical standards applicable to them"[157]. Increasingly, self-checking and control systems are being developed to protect companies and, more broadly, the economic system.
With regard to CSR rules, compliance can be approached from two viewpoints: corruption (3.2.3.1) and GDPR (3.2.3.2).

151 Article L. 4121-1 of the Labour Code.
152 Cass. soc., 1 June 2016, no. 14-19.702.
153 Cass. soc., 27 November 2019, no. 185-10.551.
154 With the payment of an amount equal to the total amount of the injury suffered during the period between their dismissal and their reinstatement, up to the amount of wages of which they were deprived, and possibly damages for moral injury.
155 Payment of a sum of compensation for invalid dismissal at least equal to the last six months' wages (Article L. 1235-2-1 of the Labour Code), compensation for breach of the employment contract (Article L. 1235-3-1 of the Labour Code), and possibly damages for moral injury.
156 Sexual harassment is punishable by two years' imprisonment and a fine of EUR 30,000, increased to three years' imprisonment and a fine of EUR 45,000 when the acts are committed in specific cases itemised by the law, and harassment is punishable by two years' imprisonment and a fine of EUR 30,000.
157 Éditions législatives, "La fonction de compliance en entreprise" [The corporate compliance function], 4 December 2019.

3.2.3.1 Corruption

(A) SAPIN II LAW

In France, the Sapin II law[158], which entered into force on 1 June 2017, requires company executives to take measures to prevent and detect corruption and influence peddling, crimes whose definitions and characterisations are set out in the Penal Code.

Scope of application:
The law applies to companies having their registered office in France and at least 500 employees, or belonging to a group of companies whose parent company has its registered office in France and a workforce of at least 500 employees, and whose turnover or consolidated turnover exceeds EUR 100 million.

Procedures to be implemented:
In accordance with Article 17 of the Sapin II law, the companies concerned are required to implement the following measures and procedures:

- an anti-corruption code of conduct,
- an internal whistleblowing system designed to allow the collection of reports,
- a mapping of the corruption risks,
- procedures for assessing the situation of customers, leading suppliers and intermediaries,
- internal or external accounting control procedures,
- a training system for managers and staff most exposed to risks of corruption,
- a disciplinary system allowing the company's employees to be sanctioned in the event of a breach of the company's code of conduct,
- and an internal mechanism for monitoring and assessment of the measures taken.

The French Anti-Corruption Agency (AFA), created by the Sapin II law, has the task of overseeing the implementation of the eight anti-corruption measures by companies. The Agency may impose a pecuniary sanction of up to EUR 1 million on breaching companies. Their executives are liable to a maximum fine of EUR 200,000. It is also part of the AFA's missions to publish recommendations, in order to clarify its expectations regarding the implementation of the measures required by the Sapin II law. The AFA published its latest recommendations on 12 January 2021.

(B) WHISTLEBLOWERS

Articles 6 et seq. of the Sapin II law introduces a general regime for the protection of whistleblowers. Article 6 of that law originally defined a whistleblower as "an individual who discloses or reports, in a disinterested manner and in good faith, a crime or an offence, a serious and manifest breach of an international commitment duly ratified or approved by France, a unilateral act of an international organisation adopted on the basis of such a commitment, of the law or regulations, or a serious threat or harm to the general interest, which he or she has become personally aware of". Internal whistleblowing mechanisms are mandatory in companies with more than 50 employees.

The law gives the whistleblower special protection consisting of several components. Firstly, the whistleblower is exempted from criminal liability when the disclosure made infringes a secret protected by law. However, this exemption from criminal liability does not extend to elements covered by national defence secrecy, medical secrecy or the secrecy of the relationship between a lawyer and his or her client. The disclosure made by the whistleblower must, however, follow the whistleblowing procedure defined by the law[159].

In addition, the whistleblower enjoys immunity from any disciplinary measures. Thus, the whistleblower may not, when the disclosure is made in good faith, be excluded from a recruitment procedure, sanctioned, dismissed or subjected to direct or indirect discriminatory measures[160].

The Sapin II law prioritises internal whistleblowing to the line manager, the employer or a contact person designated by the employer. The report must be processed within a reasonable time, failing which the whistleblower may refer the matter to the judicial authority, the administrative authority or a professional association. Only as a last resort, if the report is not processed by these authorities within a fixed period of three months, may the whistleblower make it public.[161]

Lastly, the processing of reports must ensure strict confidentiality for the whistleblower, the persons concerned and the information contained in the report. Any disclosure of these confidential elements constitutes an offence punishable by a fine of EUR 30,000.
Protection for whistleblowers is increasing in the context of the transposition of Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law. The draft law aimed at improving the protection of whistleblowers was adopted by Parliament on 16 February 2022[162]. The draft law, as well as the organic law that accompanies it, was referred to the Constitutional Council by the Prime Minister on 18 February 2022.

On 17 March 2022, the Constitutional Council declared all the provisions of the new law aimed at improving the protection of whistleblowers to be compliant with the Constitution, except for Article 11, on the grounds that this was unrelated to the other provisions of the law. These two laws were enacted on 21 March 2022[163]. The draft law is due to enter into force on the first day of the sixth month following that date, i.e. 1 September 2022.

158 Law no. 2016-1691 of 9 December 2016 on transparency, the fight against corruption and the modernisation of economic life, known as the "Sapin II law".
159 Articles 6 and 7 of Law no. 2016-1691 of 9 December 2016 on transparency, the fight against corruption and the modernisation of economic life.
160 Article 10 of Law no. 2016-1691 of 9 December 2016 on transparency, the fight against corruption and the modernisation of economic life.
161 Article 8 of Law no. 2016-1691 of 9 December 2016 on transparency, the fight against corruption and the modernisation of economic life.
162 Draft law aimed at improving the protection of whistleblowers, no. 101.
163 Organic Law no. 2022-400 of 21 March 2022 aimed at strengthening the role of the Défenseur des Droits in whistleblowing and Law no. 2022-401 of 21 March 2022 aimed at improving the protection of whistleblowers.

This new mechanism makes numerous modifications to the texts that currently govern the protection of whistleblowers, including by extending the notion of "whistleblower" and the possible scope of reports, adding the notion of "facilitator", simplifying the hierarchy of whistleblowing channels, and strengthening the protection measures provided for whistleblowers.

(I) SCOPE OF APPLICATION OF THE PROTECTIVE LEGISLATION
The most significant changes introduced by the new law include the removal, in the definition of "whistleblower", of the condition concerning the disinterestedness of the whistleblower, who must nevertheless make their report "without direct financial compensation"[164]. Therefore, while the law does not prohibit the compensation of whistleblowers, it does prevent the possibility of combining such compensation with the benefit of whistleblower status, as required by the Directive[165].

Similarly, the new law removes the condition concerning the whistleblower's personal knowledge of the facts, when the information was obtained in a professional context[166].

The protection granted to the whistleblower is also extended:

- to "facilitators", meaning any natural persons or private non-profit legal entities (such as trade unions and associations) that have assisted the whistleblower in the reporting process,
- to any individuals connected to a whistleblower and threatened with retaliatory measures,
- and to legal entities controlled by the whistleblower[167].

In addition, the new law now gives a comprehensive list of the persons authorised to make an internal whistleblowing report[168].

As well as modifying the notion of "whistleblower", the new law also provides for an extension of the scope of the report, allowing that it may concern a breach that is not serious and manifest, an attempt to conceal a breach, or a breach of European Union law[169]. Conversely, however, the law adds to the list of exclusions the secrecy of judicial proceedings, as well as the secrecy of judicial inquiry and investigation[170].

(II) WHISTLEBLOWING CHANNELS
For internal whistleblowing, in entities where there is no internal procedure for collecting and processing reports, the new law allows whistleblowers to make reports to their line manager, their employer or their contact person[171]. However, when the company has established a whistleblowing mechanism, the law does not specify whether a disclosure to one of these persons allows the whistleblower to benefit from the protective legislation.

The new law makes a key change to the whistleblowing procedure that must be followed by any person wishing to claim the protection given to whistleblowers. The whistleblower can now make a report directly to an external authority without first having approached anyone within the company (for example, their line manager)[172].

The external report may thus be directed to one of the competent authorities designated by decree, to the Défenseur des Droits, to the judicial authority, or to a competent institution, body, office or agency of the European Union.

Public disclosure, which in principle remains conditional upon a prior external report not having been dealt with within a period of time set by a decree of the Council of State, may take place immediately in three cases:

- in the event of "serious and imminent danger",
- if the external report would put the whistleblower at risk of retaliation, or "would not allow the subject matter of the disclosure to be effectively addressed",
- for information obtained in a professional context, in the event of an "imminent or manifest danger to the general interest"[173].

164 Article 6 of the Sapin II law as amended by Article 1 of Law no. 2022-401 of 21 March 2022 aimed at improving the protection of whistleblowers.
165 Recital no. 30 of Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law.
166 Article 6 of the Sapin II law as amended by Article 1 of Law no. 2022-401 of 21 March 2022 aimed at improving the protection of whistleblowers.
167 New Article 6-1(3) added to the Sapin II law by Article 2 of Law no. 2022-401 of 21 March 2022 aimed at improving the protection of whistleblowers.
168 Article 8 of the Sapin II law as amended by Article 3 of Law no. 2022-401 of 21 March 2022. Thus, not only the company's staff members can benefit from the status of whistleblower, but also former staff members and job candidates, executives, shareholders or partners of the entity concerned, its external collaborators and its co-contractors and subcontractors, as well as their executives and staff members.
169 Article 6, I of the Sapin II law as amended by Article 1 of Law no. 2022-401 of 21 March 2022 aimed at improving the protection of whistleblowers.
170 Article 6, II of the Sapin II law as amended by Article 1 of Law no. 2022-401 of 21 March 2022 aimed at improving the protection of whistleblowers.
171 Article 8, I, B of the Sapin II law as amended by Article 3 of Law no. 2022-401 of 21 March 2022 aimed at improving the protection of whistleblowers.
172 Article 8, II of the Sapin II law as amended by the draft law aimed at improving the protection of whistleblowers: "Any whistleblower, as defined in section I of Article 6, may also make an external report, either after making an internal report under the conditions set out in section I of this Article or directly".
173 Article 8, III of the Sapin II law as amended by Article 3 of Law no. 2022-401 of 21 March 2022 aimed at improving the protection of whistleblowers.

(III) PROTECTION MEASURES

Partially reproducing the list derived from Directive (EU) 2019/1937[174], the new law itemises, in a non-exhaustive manner, fifteen retaliatory measures that cannot be taken against a whistleblower[175]. Any such measures, as well as any threat or attempt of such measures, are sanctioned by nullity[176].

The civil fine incurred by a person who would have initiated civil or criminal proceedings against a whistleblower, in order to hinder his or her reporting ("gagging procedure"), is increased to EUR 60,000[178].

These protections against retaliatory measures also apply to facilitators[179].

The offence of discrimination also includes any distinctions made against a person due to their capacity as a whistleblower, facilitator or person connected to the whistleblower[180].

Moreover, the principle of non-liability of the whistleblower is reinforced both on a civil and a criminal level[181]. The whistleblower cannot be held civilly liable for the damages caused by a report made in good faith. In addition, the whistleblower may not be penalised for having removed, misappropriated or concealed, in the context of the report, confidential documents containing information lawfully obtained. This protection extends to the whistleblower's accomplice, the facilitator, the connected person and the legal entity controlled by the whistleblower[182].

The text also introduces financial assistance for whistleblowers who initiate legal proceedings because they are victims of retaliation or subject to a "gagging" procedure[183].

In this context, the judge may grant an advance payment, which can be made final at any time, to cover the whistleblower's legal expenses, as well as an additional advance payment to a whistleblower whose financial situation has seriously deteriorated.

(IV) UPCOMING REGULATORY FRAMEWORK

Now that the law has been promulgated, a decree of the State Council will shortly be issued to specify some practical aspects[184], in particular regarding the reception and processing of external alerts, and the measures that companies will have to implement to adapt their internal reporting procedure to the new provisions.

3.2.3.2 Regulations on the protection of personal data

The protection of personal data is mainly governed in France by the General Data Protection Regulation (GDPR) and by Law no. 78-17 of 6 January 1978 on data processing, data files and individual liberties, as amended (the "Data Processing and Civil Liberties law"). Specific rules, for example applicable to electronic communications (e-Privacy Directive), may also apply to these issues.

This body of rules is intended to preserve the fundamental rights of individuals, particularly their privacy. The GDPR, which entered into force on 25 May 2018, thus follows on from the Data Processing and Civil Liberties law and strengthens individuals' control over the uses that may be made of data concerning them. It harmonises the rules in the European Union, providing a single legal framework for professionals and enabling them to develop their digital activities within the Union based on users' trust. The amended version of the Data Processing and Civil Liberties law establishes specific rules in sectors where the GDPR has left room for manoeuvre for Member States (e.g. in the field of health research).

174 Article 19 of Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law; Article 10-1 added to the Sapin II law by Article 6 of Law no. 2022-401 of 21 March 2022 aimed at improving the protection of whistleblowers.
175 Article 6 of Law no. 2022-401 of 21 March 2022 aimed at improving the protection of whistleblowers. These include lay-off or suspension, negative employment references, disciplinary action, non-renewal of an employment contract, transfer of duties, reputational harm, particularly in social media, or improper psychiatric or medical referrals.
176 Article 8, II of the Sapin II law as amended by Article 3 of Law no. 2022-401 of 21 March 2022 aimed at improving the protection of whistleblowers.
177 A "gagging" procedure consists, for example, of the filing of a defamation complaint against the whistleblower, with the aim of intimidating and silencing the whistleblower.
178 Article 13 of the Sapin II law as amended by Article 9 of Law no. 2022-401 of 21 March 2022 aimed at improving the protection of whistleblowers.
179 New Article 6-1 added to of the Sapin II law as amended by Article 2 of Law no. 2022-401 of 21 March 2022 aimed at improving the protection of whistleblowers.
180 Article 225-1 of the Penal Code as amended by Article 9 of Law no. 2022-401 of 21 March 2022 aimed at improving the protection of whistleblowers.
181 Article 10-1 added to the Sapin II law by Article 6 of Law no. 2022-401 of 21 March 2022 aimed at improving the protection of whistleblowers.
182 Article 6-1 added to the Sapin II law by Article 2 of Law no. 2022-401 of 21 March 2022 aimed at improving the protection of whistleblowers.
183 Article 10-1, III A and III B of the Sapin II law as amended by Article 3 of Law no. 2022-401 of 21 March 2022 aimed at improving the protection of whistleblowers.
184 Namely, to decide in particular on the guarantees of the independence and impartiality of the procedure, the time limits for feedback to the reporting party, the procedures for the closure of reports and for the collection and retention of data, the terms under which the procedure may be common to several companies of a group, and the conditions under which information relating to a report may be transmitted within the group for processing, or the list of authorities to which the external report can be made.

The GDPR imposes upon public and private actors, located within the European Union but also outside it under certain circumstances[185], obligations relating to the processing of individuals' personal data, i.e. "any information relating to an identified or identifiable natural person"[186]. This identification may be direct, by a first name or last name, or indirect, by a file number or identifier.

In particular, the GDPR requires:
- that the processing of personal data be justified by a legal basis,
- that the data subjects be informed of the manner of the processing of their data,
- that security measures appropriate to the processing operations be put in place,
- that contractual relations with any controllers or processors, as well as data transfers outside the European Union to countries that have not been deemed to provide an "adequate" level of protection, be framed in accordance with the regulations,
- that data controllers keep and maintain a register of processing operations, and that impact assessments be carried out when a risk exists,
- that data breaches be notified to the data protection authority or to the data subjects, etc.

In addition, the GDPR grants a number of rights to individuals as data subjects, including:
- the right of access to and rectification of personal data concerning them, and in certain circumstances the right to object to the processing of their personal data,
- the right to request restriction of the processing of their personal data, or to request its erasure,
- the right to portability of their personal data in certain cases, particularly where the processing of such data is based on consent,
- and the right to lodge a complaint with the competent supervisory authority.

In France, this authority is the Commission nationale de l'informatique et des libertés (CNIL), which is responsible for overseeing compliance with the applicable data protection regulations by public or private actors. In this regard, it can carry out in situ or online checks, issue formal notices and impose pecuniary sanctions determined, in particular, according to the gravity of the infringement and the degree of cooperation of the controller[187].

185 Article 3-2 of the GDPR:
"This Regulation applies to the processing of personal data of data subjects who are in the Union by a controller or processor not established in the Union, where the processing activities are related to:
a) the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the Union; or
b) the monitoring of their behaviour as far as their behaviour takes place within the Union."
186 Article 4 of the GDPR
187 These sanctions may be up to EUR 10,000,000 or, in the case of an undertaking, up to 2% of the total worldwide annual turnover of the preceding financial year, whichever is higher, or in the most serious cases, up to EUR 20,000,000 or 4% of turnover. - Art. 83 of the RGPD.

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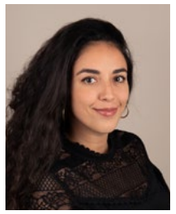

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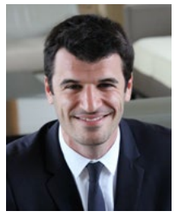

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