Societal Corporate Governance and Extra-Financial Information: Spearhead or Achille’s heel of Corporate Governance?

Catherine Malecki
Associate Professor University of Paris XI

Abstract: extra-financial information is becoming increasingly commonplace and standardized in France, in particular under the influence of financial authorities such as the AMF (Financial Markets Authority). This development has fueled the stakeholder dialogue. Stakeholders’ expectations constitute but one of many elements which shape the image of a company. Internet is also seen as playing an increasingly important role in communicating the «responsible» image of companies. The potential of reputational risk, in particular on the financial markets, is forcing companies to reconsider and correct their ‘good’ corporate governance practices. Thanks to emerging soft law, consideration for environmental concerns has become instrumental in helping companies focus upon corporate governance concerns that might otherwise have remained at the periphery of their interests and priorities. In France, the Grenelle II Act has, to a certain extent, shifted responsibility for ecological damage caused by subsidiaries, to parent companies. This is a good example of connecting hard to soft law.

Under pressure of shareholder activism, companies now understand that they have a vested interest in adapting their management methods and production systems to societal and environmental standards if they wish to continue to attract investments. This illustrates that Socially Responsible Investment (SRI) does indeed impact corporate issues and can be used as a tool for correcting the behaviour of officers, notably via the emergence of reputational risk considerations (good or bad, spearhead or Achille’s heel of corporate governance).

Keywords: Societal Corporate Governance (SCG), Socially Responsible Investment (SRI), Corporate Social Responsibility (CSR), European Union, Corporate Governance, Reputation risk, environmental concerns, Shareholder activism.
Introduction

Since introduction of the May 15, 2001 NRE Act (New Economic Regulations Act), France has made great progress in the area of corporate social responsibility (CSR) with the "Grenelle I" (August 1, 2003) and "Grenelle II" Acts (July 12, 2010). Their explicit confirmation of the role of stakeholders, the role of the State shareholder, and the importance awarded to publication of extra-financial information, is indicative of the increasing relevance and awareness of CSR. This awareness has been accelerated by the requirement that financial information, which is notoriously complex to analyze and calculate, be further standardized. A recent AMF report (December 2, 2010) provides benchmarks for standardizing this type of information, which information is also considered by rating agencies to be an important communications tool. Extra-financial information, in which both shareholders and other stakeholders have an interest, may contribute to the emergence of a new kind of risk that will need to be taken into consideration by listed companies. They will need to be able to control this risk internally, and will need to report on certain issues as a result of the «comply or explain» principle imposed by law on July 3, 2008. Corporate governance codes will require consideration, and novel and/or additional insurance issues may come into play.

A recently created obligation (Decree of June 23, 2010 and Authorization of December 9, 2010, transposing the Directive of July 11, 2007 concerning certain rights of shareholders in listed companies into French law), recommends that listed companies fulfil their information obligations vis-à-vis shareholders by means of websites. Quick and direct dissemination of information to shareholders is thus favored. Paris Europlace issued recommendations concerning SRI at an earlier stage (May 14, 2008), and remains involved in matters concerning this type of information. The increasing use of CSR criteria when determining the variable component of managers’ remuneration packages, application of performance indicators, and the presence of extra-financial committees within corporations,
are all examples of CSR principles that are being applied to the government of entreprises (SRI) to which Paris Europlace dedicated recommendations on May 14, 2008. These recommendations have proven authoritative and have impacted the way in which companies deal with CSR (related) principles. In Europe, the European Parliament adopted a Resolution dated March 13, 2007, titled "a new partnership". In this Resolution, the Committee was invited "to work towards increasing responsibility of leaders of companies with more than 1,000 employees, and was invited to take action towards reducing the potential negative impact of a company’s activities on its redundancy levels and environmental plans". The EU now expressly invites and encourages institutional investors to exercise their voting rights, and when doing so to take societal and environmental information into account. National regulators and the AEMF (European Financial Markets Authority) could also be envisaged as playing a role in this respect.

Let us now address on the one hand the impact of extra-financial information (1) and on the other, the emergence of a societal corporate governance (2).

1. – The impact of extra financial information

The Grenelle II Act, promulgated on July 12, 2010\(^1\), represents an important ‘merger’ of French business law and CSR. The Grenelle II Act articulates national commitment to the environment. Aside from the method implemented by the Act\(^2\), it is propitious that section VI of the Act dealing with "governance", does not differentiate between social and environmental information concerning listed and unlisted companies, but awards them equal treatment.

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\(^1\) Loi n° 2010-788 du 12 juillet 2010, portant engagement national pour l’environnement, JORF n°0160 du 13 juillet 2010 page 12905 texte n° 1.

Grenelle II propagates a new form of governance, one that is strongly influenced by ecological considerations. Driven by ecological urgency[^3], the political awareness of an obligation to act, and the necessity to think of man and his world[^4], the sustainable company is gradually starting to take root. This increased awareness, now also embraced by business law, stems from the NRE Act of May 15, 2001[^5], and has taken a decade to evolve. This is, however, hardly surprising seeing as it would have been highly innovative if "stakeholders" were to have been mentioned in the NRE Act at the time of drafting. From the moment the NRE Act was implemented, questions relating to CSR have given rise to doctrinal studies regarding the scale and scope of these issues. The process by which Grenelle II came into being was a result of broad participation on the part of various actors, none of whose interests were omitted from the resulting corporate law revisions. The corporate law revisions brought about by Grenelle II concern social and environmental information, the new actors involved in corporate governance, and the commitments of parent companies in respect of environmental requirements.

Social and environmental information is at the heart of the Act’s provisions.

So, thanks to Grenelle II, the new corporate law annex 5 art. L. 225-102-1 C. com. stipulates that, in addition to including "information concerning the way in which the company takes social and environmental consequences of its activities into account", the annual report must also mention "societal commitments undertaken in favour of sustainable development". The door has thus been opened to addressing societal commitments. Such societal commitments will concern any voluntary initiative taken in favour of sustainable development. However, the question then arises, who will verify the impact of those...

[^4]: Zarka, Y.-C., Discours préliminaire, Philosophie du monde émergent, in Le monde émergent, préc., p. 5 et s.
[^5]: Loi n°2001-401 du 15 mai 2001 sur les régulations économiques
initiatives? This is very difficult to quantify, compute, and at the same time distinguish, because such initiatives can take on different forms.

1.2 - The companies concerned

Almost all companies are concerned with the various ways in which this type of information can be provided, its accessibility, and its certification. The social and environmental information that must be disclosed concerns both listed and unlisted companies. Thus, open-ended investment trusts and management companies (article L. 214-12 of the Monetary and Financial Code) will also have to indicate how criteria relating to social and environmental objectives and the quality of governance are dealt with in and impact their investment policies. In addition, and above all, they must also specify "how voting rights attaching to financial instruments resulting from these ‘sustainable’ investment policy, choices are exercised". Thus, the route is opened to more "responsible" shareholding, and the stage set for socially responsible investments (SRI). The new article L. 225-102-1 al. 8 C. com. increases the scope of this obligation to disclose social and environmental information to include "companies whose balance sheet results or turnover, and number of employees exceed certain thresholds determined by decree of the Council of State. When a company adopts accounts including such additional information, that information must be substantiated and must concern the company and all of its subsidiaries as defined in article L. 233-1, or the companies which, according to article L. 233-3, are controlled by the parent company. When subsidiaries or controlled companies have their headquarters in France, and when they include classified installations that are subject to authorization or to recording, the


7 Malecki, C., (2010), L’investissement socialement responsable : quelques remarques sur une valeur montante de la gouvernance d’entreprise « verte », in La gouvernance des sociétés cotées face à la crise – De la crise financière à une crise de confiance, a text under the direction of Magnier V., éditions LGDJ, collection Droit des affaires, p. 263 et s.
disclosed information must concern each of them when this information cannot be consolidated". Credit institutions, investment companies and finance companies, whatever their legal form, will also be impacted by disclosure of this type of information (cf. article L. 511-35 of the Monetary and Financial Code integrated by a new paragraph). Mutual insurance companies (cf. article L. 114-17 of the mutual insurance code, cf. new h), mutual insurance companies (cf. article L. 322-26-2-2 of the modified insurance code), cooperatives of the farming and fishing sectors (cf. article L. 524-2-1 of the rural and seafishing code), and cooperatives (cf. article 8 integrated by a new paragraph of the law No. 47-1775 of September 10, 1947 concerning company structure) will all be required to disclose such information if the combined conditions of article L. 225-102-1 annex 6 C. com. are met. As a result, "staff and stakeholder representatives participating in dialogues with companies will be able to express their opinion concerning initiatives relating to social, environmental, and societal responsibility of companies in addition to the presented indicators". Public enterprises and institutions are also impacted, as it would had been inconceivable if the State shareholder were to have been exempted from the concerns and constraints stemming from CSR.

As far as the Societas Europea (SE) \(^8\) (governed by the laws applicable to limited liability companies in the State where the company’s statutory seat is established) are concerned, Grenelle II must be applied on the basis of European Regulation 2157/2001 (article 15). Employee involvement in CSR matters is seen as being essential in the SE, the dialogue with employee representative bodies in respect of sustainability initiatives cannot be disregarded.

1.2 -The requirement of standardized information: the role of the financial Authority

\(^8\) Cf. article L. 2353-1 C. trav. sur le comité de la société européenne.
Besides the fact that the obligation to disclose social and environmental information in a sense smoothens out the differences between listed and other kinds of companies\(^9\), the use and legibility of this type of information also constitute a justifiable concern of Grenelle II. Indeed, decrees by the Council of State have specified the "typical presentation" (cf. article L. 214-12 C. mon. and fin. new paragraph) and "the modes of their presentation so as to allow for a meaningful comparison of data" (art. L. 225-102-1 new annex 5 C. com.).

The essential and inescapable measure aimed at avoiding this rather dense type of information from becoming unusable, lies in the adoption of reliable and comparable reference tables. By referencing the principles of the GRI (Global Reporting Initiative), the Grenelle II obligation to establish a means of comparing CSR-related data goes part of the way towards solving an existing and acknowledged difficulty in this field. However, although the GRI website is loaded with indicators and reference tables, agencies specialized in this field still remain scarce\(^10\). A clear frame of reference will, therefore, be necessary.

The French authority for financial markets (AMF)\(^11\) expressly invites listed companies to use benchmark websites and stresses that value-added and accessible social and environmental information can only be provided if the information is legible and comparable and is formatted from one fiscal year to the next. This reinforces the approach that public opinion in this area had been taking for some time now\(^12\). In a very instructive report, the AMF « recommends that companies that make use of indicators, define them thoroughly and use them (since these indicators always respond to a need), in a stable and consistent fashion from one fiscal year to the next. In this respect, companies should attempt to be clearer

regarding definitions and calculation methods applied. On the other hand, it would seem important that companies communicate on the most significant indicators relating to their (evolving) activities and that, they provide an accurate image of the company in order to enable investors to be in a position to compare companies »\(^{13}\). In respect of financial risks, the AMF stresses that: «The links between the risks, in particular those described in the paragraph "risk factors" of the reference document, and the organized internal control procedures, should also include the extra-financial risks, that is, especially the social and environmental risks. This should allow a better understanding of the way a company deals with these risks, formalizes them and finally, tries to avoid them. Almost all companies are encouraged to implement an approach aimed at identifying, analyzing and dealing with risk. It would seem reasonable if extra-financial risks were also to be included»\(^{14}\). The Grenelle II Act appeals in broad terms to voluntary commitments, initiatives, and other opinions, and can in that sense almost be considered to be representative of an age of "rule it yourself". All ingredients of a «societal» corporate governance are blended together by it. The codes of corporate governance\(^{15}\) will be called upon when setting up best practice standards, but the challenge will ultimately be to know just what degree of freedom remains given the constraints of Grenelle II and possible deviations therefrom. Is, for example, any room left for an optional normative form\(^{16}\)? Do the codes for listed companies - especially where conditions in respect of information that cannot be calculated\(^{17}\) or quantified are concerned-

\(^{13}\)Aforesaid report, p. 23.

\(^{14}\) Cf. the conference organized by Le laboratoire DANTE, Faculté de droit, Université Versailles Saint-Quentin le vendredi 18 juin 2010 sur «L’appréhension du risque financier par le Droit» http://www.regulatorylawreview.com/IMG/pdf/Programme_colloque_maquette_def_1_.pdf


\(^{17}\) All the environmental or social natural information is not coded, the return of financial markets will be essential, Teller, M., (2005), Les marchés financiers, régulateurs de la politique environnementale, Bull. Joly Bourse, p. 211 ; Trébulle, F.-G., (2004), La comptabilisation de l’environnement, Dr. sociétés, juillet, p. 9, JCP éd E 2006, chron 1257.
allow companies freedom from this constraint? What will the future of the "comply or explain" principle\(^\text{18}\) be in this maize of legal obligations and voluntary initiatives? Two justifiable questions could arise in this context: what margin is left for manoeuvre\(^\text{19}\) and what are the risks? The Grenelle II Act seems to stress the phenomenon of "proceduralisation", in particular by creating new cases governed by procedural regulations, and by appealing to the technique of "checking" social and environmental information passed on for evaluation to the shareholders (art. L. 225-102-1 al. 9 C. com.). The penalties for non-compliance with this type of corporate governance will most certainly be legal\(^\text{20}\), but new sanctions such as the market’s response could also play a role, especially in the form of stakeholder intervention, reputational risk and/or "naming and shaming". The effectiveness of a company’s governance structure will in large part depend upon evaluation and self-assessment.

In France, it is specifically the Code MIDDLENEXT that promotes these principles. So, in the AMF’s first report on the governance of companies, executive remuneration, and the internal control of the VaMPS, it insisted upon an evaluation of Board of Directors’ and its committees’ work. The "Code" in effect recommends that an "annual self-assessment" be undertaken by the Board of Directors\(^\text{21}\). In its annual report, the AMF stresses the need "to

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\(^{19}\) Magnier, V., (2008), Le principe se conformer ou s'expliquer, une consécration en trompe l'œil ?, JCP E act., 280 ; Les manquements des sociétés cotées à la règle de conformité, JCP E (2010), n° 1234 ; La règle de conformité ou l’illustration d’une acculturation méthodologique complexe in La gouvernance des sociétés cotées face à la crise, Pour une meilleure protection de l'intérêt social, Sous la direction de Véronique Magnier, Préf. de Philippe Marini, LGDJ, Collection Droit des Affaires, 2010, p. 249 et s.

\(^{20}\) Such as an administrative penalty, cf. article L. 632 C. mon et fin.

\(^{21}\) However, in view of the fact that the Code MIDDLENEXT insists on the "sovereign power of the shareholders " by reminding in particular that " the point of attentiveness thus consists in estimating if "the shareholder " has clear information about major and predictable risks which could threaten the durability of the profit", the conclusions of the self-assessment of the works by the Board of Directors will be instructive.
explain in a elaborate way" the reasons for not implementing such recommendations. This is particularly relevant given that the Code Middlenext insists upon the "sovereign power of the shareholders". The results of the Board of Directors’ self-assessment are therefore expected to be instructive. Consequently, corporate governance has made an assessment by the Board of Directors into an essential element of governance. In accordance with the recommendation published by the European Commission in 2005 concerning the role of the non-executive members of the Board of Directors and members of the Supervisory Board of listed companies, the Board of Directors and Supervisory Board of the French “société anonyme” should prepare an annual review of its performance. As part of this exercise, it should also consider possible revisions to its composition, organization and operations, all with a view to reviewing the skills and efficiency of each of its members and of its committees. It should also be prepared and able to measure its results against stated objectives. The European Commission’s Green Book further recommends "that regular recourse (for example, every three years) to an external facilitator could improve this evaluation process, could confer an objective status upon it, and could facilitate comparison with best practices adopted by other (peer) companies”. Criteria for the evaluation of corporate governance best practices are already well known and applied. They can, however, be enriched by the CSR perspective.

2. – The emergence of a « societal » corporate governance

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22 Aforesaid report, p. 32.
26 Such as Governance Metrics International (GMI) et institutional Shareholder Services (ISS)
The stakeholder dialogue poses new problems: varied expectations could contribute to building a company’s image but could also be detrimental thereto. In French Company law, this kind of dialogue is just beginning to emerge as are companies’ approaches to dealing with it.\textsuperscript{27}

2.1 – The new problems presented by the stakeholder dialogue

The Grenelle II Act explicitly confirms "the stakeholder model". This approach is directly inspired by European texts on "societal commitment in favour of sustainable development".\textsuperscript{28} The new actors\textsuperscript{29} will need to contribute to this ‘new’ corporate governance by actively voicing their «observations concerning social, environmental, and societal initiatives of the companies in which they have an interest». The social and environmental information included in this dialogue will be subject to inspection by a new actor, an "independent third body", whose opinion and findings will be communicated to the "shareholders’ assembly" (art. L. 225-102-1 annex 9 C. com.). Besides, Grenelle II\textsuperscript{30} allows for integration in the enterprise of numerous ethical principles and socially responsible initiatives, outside of the scope of corporate governance codes. The essential question will now be, how to interpret and value the impact of such socially responsible commitments.\textsuperscript{31}

Under influence of the stakeholders, it is not inconceivable that French Company Law would

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\textsuperscript{28} The notion of sustainable development thus makes its entrance in the Charter of the Environment, cf. art. 6


accept an open interpretation of social interest; such a position was propagated six years ago already by Canadian Company Law\(^{32}\). Social interest could be used as a point of reference or benchmark for weighing the various stakeholders’ interests, although a hierarchical ordering or prioritization of their respective interests would remain imperative. In addition, conflicts of interests existing between them would also need to be taken into consideration. Processes of arbitration will be necessary, but the question remains: what criteria should be used when attempting to prioritize stakeholder interests? The criteria of the value of the company is lacking in precision\(^{33}\) although the French approach is on its way to accepting it. We are, however, still waiting for the decrees implementing Grenelle II, which decrees are the subject of important negotiation. CSR lends itself particularly well to an analysis of the impact of present and future social commitments undertaken by the companies. Such commitments could create a good or bad image for the company. Public opinion plays a role in forming the notion of ‘reputation’ of a company, which is the opinion and, technically speaking, the social evaluation by the public at large of a person, a group, or an organization. It is a factor that is relevant in numerous domains, such as education, social status, the business and the performance of a company. The emergence of such a thing as ‘societal reputation’ also concerns the executive members of the Board: in France, for example, a reputation index exists that is based upon compensation received by executive Board members upon their departure from the company\(^{34}\). This kind of corporate governance – a partnership governance – embraces in a wider sense the residual ‘creditors’ of the company by including the totality of its stakeholders, i.e., the shareholders, the leaders, but also the employees, the customers, and the suppliers. By mentioning the notion of "societal


\(^{33}\) Cf. Rousseau, S. and Tchotourian, I. *ibid*, n°26, p. 748.

commitments in favour of sustainable development"\textsuperscript{35}, a notion which clearly stems from European texts, the Grenelle II Act will fuel stakeholder expectations\textsuperscript{36}. Stakeholders will not only be expecting concrete answers or concrete reactions from the companies, they will also become interpreters of their own needs: in fact, Grenelle II, at least in the first proposal, invites stakeholders to ventilate their opinions concerning social, environmental, and societal initiatives of the companies in which they have or hold an interest.

2.2 - Environmental law and group of companies

Financial solidarity in the service of environmental law, constitutes another spearhead of Grenelle II- we recognize two traditional facets of the CSR: a voluntary approach as well as a legal constraint.

The voluntary approach takes the form of a voluntary "commitment" in article L. 233-5-1 C. com.\textsuperscript{37} by referencing contractual law. Said article establishes grounds for entering into a voluntary commitment\textsuperscript{38}, undertaken at the initiative of a company, in three specific situations: towards its subsidiary pursuant to article L. 233-1 C. com., in the event that it owns a participation in the form described by article L. 233-2 C. com., and in the event that it controls a company in the form mentioned by article L. 233-3 C. com.

\textsuperscript{35} The notion of sustainable development enters corporate law cf. the French «Charte of the environment», cf. art. 6


\textsuperscript{37} L’art. L. 233-5-1 C. com. states that «the decision by which a company which holds more than half of the share capital of another company in accordance with article L. 233-1, which holds a stake as per article L. 233-2, or which controls a company as per article L. 233-3, undertakes to bear, in the event of a default by the company it has a relationship with, all or part of the compensation and reparation prevention obligations that are incumbent on the latter pursuant to articles L. 162-1 to L. 162-9 of the environment code, depending on the structure of the company, and which are subject to the procedure mentioned in articles L. 223-19, L. 225-38, L. 225-86, L. 226-10 and L. 227-10 of this code.”

Therefore, "in the event of bankruptcy of the company which is ‘tied’ to the company undertaking the voluntary commitment pursuant to one of the aforementioned situations", the latter can undertake a commitment "to establish at its expense, all or any of the obligations of prevention and repair in implementation of articles L. 162-1 and L. 162-9 C. env." However, such a decision will be subject to procedures set forth in the so-called ‘regulated agreements’.

The latter requirement pertains to new forms of agreements that are made specifically subject to these procedures, which agreements will without a doubt augment this new form of societal governance. Recourse to the process of regulated agreements will in turn increase the role of the auditors in respect of social and environmental information.

*The confirmation of a new financial solidarity within the group of companies* – The Grenelle II Act modifies the ‘make-up’ of the group of companies\(^39\): it symbolizes an increase in the importance of environmental responsibility, a decrease in the influence of the French cardinal principle according to which a parent company cannot incur any responsibility due to (in)actions of its subsidiaries, and the overruling, to a certain extent, of the principle of independence of the legal entity. The ensuing «environmental» corporate governance proposes a new approach to group companies that is driven by the "crucial question"\(^40\) of who can be held responsible for financing environmental clean-up, or ‘restoration’ of industrial sites- a question that is the subject of private law, commercial law, and laws concerning groups of companies. Article L. 512-17 C. env. provide for responsibility of parent companies towards their subsidiaries in respect of measures pertaining to the restoration (clean-up) of sites upon a subsidiary’s default or business failure. This takes place at the initiative of the liquidator, the State Prosecutor or another State representative when


«the existence of a characterized fault committed by the parent company which contributed to insufficient subsidiary assets »\textsuperscript{41} can be established. The example provided by the Metaleurop case was taken into consideration\textsuperscript{42} when drafting this new legal approach, as was the circumstance that article 1382 of the Civil Code had proven ineffective in creating legal grounds for general responsibility for environmental risk.\textsuperscript{43} The role of the site ‘developer’ is the subject of legislation dealing with the restoration of industrial sites, which have in the past been authorized for classified installations, with the exception of the so-called ‘declared installations’\textsuperscript{44}. Pursuant to article 512-17 al. 1st C. env., the subsidiary company has to be "the developer" of a site in the material sense\textsuperscript{45}. One might have expected Grenelle II to confirm the environmental responsibility of parent companies. In fact, during the transposition of the Directive of April 21, 2004 concerning environmental responsibility, implemented by law of August 1, 2008, the principle of coverage of the environmental liabilities of the developer was invoked. This being said, the current text is nonetheless considered a set back in light of the doctrinal propositions, which at the time pleaded for a broader scope that would have included environmental responsibility of parent companies\textsuperscript{46}. The proposed text is, however, still constructive as it is indicative of technical efficiency and caution in the as yet unsettled legal ground that lies between the laws pertaining to groups of

\textsuperscript{41} cf l’article L. 512-17 al. 1er Code env. as adopted: “When the operator is a subsidiary company pursuant to article L. 233-1 of the code of commerce, and liquidation proceedings have been brought against it or laid down against it, the liquidator, the public prosecutor or the state representative in the department may refer to the court which initiated or ruled on the liquidation to establish the existence of a breach as categorised by the parent company which contributed to a lack of assets of the subsidiary, and to ask it, when such a breach has been established, to make the parent company responsible for all or part of the financing of measures to restore site/s once activities have ceased.

\textsuperscript{42} Saint-Alary-Houin C., (2008), La responsabilité de la société-mère en raison des préjudices environnementaux causés par sa filiale en difficulté, in Sites et sols pollués : enjeux d’un droit, droit en jeu(x), op. cit. p.169;


\textsuperscript{44} Cf. Blin M.-P., « De l’évolution des espèces » : vers une responsabilité environnementale des groupes de sociétés, op. cit.

\textsuperscript{45} Rolland B., Variations autour de la notion d’exploitant, in Sites pollués : les enjeux d’un Droit, un Droit en jeu(x), précité, p. 145 et s.

\textsuperscript{46} Cusacq N., (2009), La responsabilité des sociétés mères du fait de leurs filiales : éléments de droit positif et de droit prospectif, RRJ, n°2 ; Grimonprez B., (2009), Pour une responsabilité des sociétés mères du fait de leurs filiales, Rev. sociétés, n°4, p. 715 et s.; Lienhard A., (2009), Responsabilité de la société mère en cas de pollution par une de ses filiales, D, 2413.
companies, the law of tort, and environmental law. The requirement of "the existence of a characterized fault" does forces the judge play a role that is often placed out of reach in issues regarding ecological governance. When a characterized fault is established, it is now possible to ask the judge, “to hold the parent company responsible for the financing of any and all restoration measures relating to sites exploited by companies lower down in the corporate chain whose activities have failed". True, the financing can only be operated in whole or in part, but this headway is considerable because it also leaves a wide margin for insurance intervention.

- The role of the State - The "corporate social responsibility of companies" (art. L. 225-102-1 al. 7 C. com.) is expressly "encouraged" by the French government, which in turn will have to present "a report to Parliament every three years concerning the application of CSR measures by companies and the CSR actions which it itself promotes in France, Europe, and at an international level": in a way this confers upon corporate governance a degree of public interest which coincides logically with the initiative mentioned in the title of the Grenelle II Act which relates to national commitment for the environment".

2.2 – «Societal» corporate governance : a corrector of companies’ behavior

The dialogue amongst stakeholders has become an important element in corporate governance, even though the indicators allowing for a good and coherent reading of this dialogue are still lacking. A recent study showed that the variety of the criteria involved does not allow for any real estimate of financial value creation. Nevertheless, the circumstance that it is becoming standard practice to take this type of information into consideration,
combined with numerous indications of the existence of such a thing as an extra-financial reputation, can provide incentives for correcting a company’s behavior.

Corporate « societal » reputation also has its own rating indices and indicators. In the United States and England, a pragmatic approach favouring a single "best corporate reputation" has been developed. In France in September 1994, l’Observatoire de la Réputation published the first rating index concerning the financial reputation of listed companies, and created an indicative rating system catering for variances in corporate reputations. A company can be awarded an indicative Reputation on a value scale of R to RRRRR (measured against specific values). Air Liquide, Danone, L’Oréal, Canal+, Carrefour, Total, Rhône Poulenc, LVMH, and Société Générale, for example, have been awarded a reputational rating of “at least RRR” using this system. This reputation index gave rise, because of its "performance", to the creation of a thematic FCP managed by Axiva (AXA). On September 1, 2003, FCP reputation merged with Euro AXA Responsible Values.

Research into and consideration for the financial reputation of companies is at a mature stage, and has a substantial lead on any such activity relating to extra-financial information. Gradually, however, thanks to the concepts of ethical or responsible company behavior that have been absorbed by CSR in general, the extra-financial reputation can now be considered as being societal in nature. The methods required for evaluating factors contributing to extra-financial reputation are numerous but effective: thanks to agencies such as CapitalRisk (focussing on remuneration of the executive members of the Board of Directors), the administrators are becoming more sensitive to these issues. as is illustrated by their acceptance of performance indicators of company management such as the MVA (Market Value Added),

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49 In 1995 and every 5 years, the Observatory of the Reputation notes the companies of the CAC 40 (PARIS STOCK INDEX) as to their reputation. Published in February 2010, the chart placed Air Liquide and Essilor in the lead (RRRRR) and Xavier Fontanet "as the chief executive having the best reputation".
which is the wealth created and accumulated for shareholders by the company from the time of its inception, the results of which will partially depend upon market capitalization), and EVA (Economic Value Added), which is a performance indicator for management. The latter is used to measure the quality of the management team. Will the presence of (more) women on the Board of Directors or Supervisory Board be an indication of openness and efficiency and perhaps even of "good public opinion"?

The stakeholders’ dialogue has become an important aspect of corporate governance and as such a corrector of behavior. The sensitive issues relate to big climatic concerns and "traditional" corporate governance issues such as: the Group’s footprint, concern for the environment when designing company products, social issues, corporate water consumption, the protection of the environment in a broader sense (for instance, the prevention of disease), financial support to environmental causes, renewable energies, communication, integration human rights compliance in corporate audit programs, global programs concerning the differences in executive director remuneration and conflicts of interests, diversity issues, the presence of women on the Board of Directors and in the Supervisory Board. These expectations all hail from different directions and have different agendas; it is very difficult to organize them into an operational hierarchy. CSR depends upon good communication.

Some use the term "marketing" , others refer to public relations vis-à-vis the stakeholders.

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50 The Anglo-Saxon studies and research centers dedicated to these issues abound; let us quote for example, Women matters, McKinsey & Company, 2007; Female Leadership and Firm Profitability, Finnish Business and Policy Forum — EVA 2007; The Bottom Line: Connecting Corporate Performance and Gender Diversity, Catalyst 2004


There are many CSR factors that may form the basis for forging a societal reputation. This creates an impression of fragility because it (a societal reputation) could in principle be destroyed quickly following any form of communication that might give rise to mistrust vis-à-vis a company and its intentions. For example, a negative NGO (non-governmental organization) message can place a burden on a company’s reputation if it resonates for a long time, in which case it could basically "freeze" the image of the company. On the other hand, a strategy change in the direction of wind energy or renewable energy by a major oil company might be positively welcomed by the stakeholders, mismanagement of an ecological disaster then again, could suddenly affect the « reputational » image of that same company. These concepts have been addressed in management sciences, especially in Anglo-Saxon countries, for some years now.

The reputation of a company will for a large part be the result of the stakeholder expectations. Let us take the example of the brand Mattel which endured a campaign of belittlement by Greenpeace in Indonesia: the Barbie doll, the trademark toy of this brand, happened to be packaged in compound cardboard packaging made up of a mixture of tropical wood that is taken from the deforestation of Indonesian forests. This degradation of forests led to concern in certain regions that sheltered the last remaining tigers and orangutans of Sumatra. Through this campaign, Greenpeace also criticized the Asia Pulp and Paper company, the Indonesian

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paper pulp leader, but also a subsidiary of Sinar Mas, the palm oil industry giant which had already been targeted by a campaign led by the environmentalist NGO. In view of this offensive, Mattel reacted very quickly. It announced that it was going to stop stocking from Indonesia for six months. During this period, the American company investigated the Greenpeace charge.

Social responsible investments (SRI) - There are many vectors of societal image within a company. In France, the Novethic indicator attaches importance to constant growth of the ISR, the leader on the French market being AM Dexia. Insurance companies, pension funds, and mutual funds are becoming more and more sensitive to SRI. Companies active in the chemical and oil sector, a sector primarily concerned with SRI, and banking institutions involved with industrial investments, are seen to be paying particular attention to SRI (the annual reports of CERES indicate that, since 2005 there has been a clear change in attitude in this respect, particularly in the banking sector which takes environmental factors into account in its risk management). SRI lends itself to numerous research themes. In particular, because of its extra-financial character, the methodology applied to its ratings is an issue which will become essential for the rating agencies that were at the heart of the storm of the financial crisis.

Although SRI is a topic in which management sciences were interested very early on, the questions raised by it are also legal in nature, for example when relating to corporate governance, sustainability ratings, or even interculturalism, the most recent tendency which

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60 http://www.greenpeace.org/france/barbie
provides another perspective to the limits of SRI. Finally, SRI is at the heart of stakeholder interest by virtue of the values it contributes to labor law. This in turn leads us to the following question: would consideration for labor law by these funds benefit the stakeholders in the governance of the enterprise? 64

In France, the recommendations of Paris Europlace65 to favor SRI are witness to its interest as a topic. On May 14, 2008 Paris Europlace’s financial division published its conclusions and recommendations in respect of "socially responsible investment". Paris Europlace expressly recommended that "initiatives relating to third party certification of the extra-financial data contained in the annual reports of companies be encouraged" and that "the dialogue with companies be clarified and strengthened with a view to achieving additional dissemination of extra-financial information with a view to enabling investors to better estimate the assets and risks of companies on the subject". The asset management industry with its predominance of SRI funds of the OPCVM type, is progressing strongly in this area. Paris EUROPLACE’s idea of creating a "sustainable investment committee" is positive, as long as this committee can really spur the further integration of extra-financial factors into investment decisions, such as consideration for employee commitments or better yet, the capacity of the company to innovate with an eye to sustainable development. Such an initiative on the part of Paris EUROPLACE will require the identification and definition of matrices that would allow those extra-financial dimensions that are useful, reliable, and relevant for companies and investors to be measured. The interest of such an initiative also consists in taking long term interests into account.

In France, the dominant role of institutional investors is a determining factor. Given the amounts managed by them, their capacity for investment is decisive. But this investment encounters the same hesitations towards SRI in spite of the necessity of taking SRI elements (environmental and social) into account, especially when determining a long-term strategy. Loyalty obligations and the responsibility of the professional investors must not be neglected in SRI; the last are thus a "laboratory" for corporate governance. The flow of information and transparency with regard to social and environmental data are particularly important, and in it it is allowed to assert that SRI funds can contribute to a better corporate governance. It is by the right to vote that the administrator of the SRI fund can enforce compliance with the ethical, social, and environmental values which drive the fund, but the exercise of this right is not shielded from conflicts of interests. Furthermore, the problem of shareholder activism calls for a detailed analysis, in as much as ethical funds are minority shareholders.

. – Towards an « e » - social corporate governance – The internet generation has caused corporate governance to evolve into « e » - corporate governance.

The Decree of June 23, 2010 transposing directive no. 2007/36 /CE of July 11, 2007 concerning certain rights of shareholders in listed companies is indicative of this development. It allows for, and may favor, the exercise of certain shareholder rights through the medium of the internet, in addition to the more traditional methods already available to shareholders (vote by proxy, by correspondence, or by electronic format, registration of resolutions). This decree, which came into force on October 1, 2010, requires that listed

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67 Riassetto I., (2005), Fonds éthiques et sociétés commerciales, Mélanges D. Schmidt, Joly éditions, p. 399 et s., sp. n°31, p. 419.
companies use their websites to fulfil information obligations towards their shareholders.\textsuperscript{69} The outcome of all votes cast during the General Assembly, including in particular the total number of votes exercised per resolution, must, for example, be published on the company’s website no later than two weeks after the General Assembly. This must be done by reporting the number and percentage of votes cast against the resolution, including any abstentions: so many valuable tools of information. The reputational risk resulting in the financial market as a result of behavior that is not in furtherance of societal commitments in favour of sustainable development, could constitute an effective penalty, and it is the dissuasive impact of potential negative reputational risk that could play a role when « driving » regulation of the governance of company. In addition, this governance of a social company will give way to a shareholding which, due to the lack of being active or "activist", can be responsible: institutional investors and representatives of the State in particular. The Ordinance no. 2010-1511 of December 9, 2010 and the Decree no. 2010-1619 of December 23, 2010 transposing the directive no. 2007/36/CE of July 11, 2007 concerning the exercise of certain rights of the shareholders of listed companies\textsuperscript{70} opened the door to a shareholder democracy in listed companies.

\textbf{Conclusion}

\textit{SCR and the impact on the environment} – Environmental law acts as a political catalyst.\textsuperscript{71} Affairs such as The Exxon Valdez, Enron\textsuperscript{72}, Erika\textsuperscript{73} are engraved in our collective

\textsuperscript{69} Art. R. 210-20 C. com.
\textsuperscript{72} Heal Paul M., Palepu Krishna G., (2003), \textit{The Fall of Enron}, \textit{Journal of Economics Perspective}, 17(2). pp. 3-26, Spring ; the Enron case which gave rise, in particular, to whistleblowing, cf. on this point, Barière Fr., (2010), A propos de l’arrêt du 8 décembre 2009 de la Chambre commerciale de la Cour de cassation, \textit{Rev. soc.}, p. 483 et s., sp. n°9, p. 485. These alerts may in the future prevent such cases which are extremely damaging to the company’s image.
memory. How not to think of Rousseau, who seems to have disappeared from contemporary political speech, in this consideration of man as a social being who is at the center of the sustainable development issue? Certainly, it would naturally be hasty to view the Grenelle II Act as a new "social contract", but this opening up of the company to new actors under duress of increasingly pressing social and environmental concerns, with a clear headway in labor law, also opens the way to a more general reflection on social interests. CSR will have to make a place for itself amongst treaties and textbooks on corporate law apart from that already defined for it by corporate governance, and will at any rate invite us to rethink existing concepts of corporate governance. Therefore, at the same time within listed companies and thanks to immediate return on financial markets by the risk of reputation or the image of the company, the consideration of the possible compensations to be granted to the plaintiffs, form the criteria CSR can contribute to force companies to integrate in an effective way the imperatives in favour of a necessary awareness of their impact on the environment. Thus, extra financial information could be the spearhead of Corporate Governance.