منتـــــدى الحوكـــمة
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The emergence of the energy concerns in the governance through social and environmental responsibility (SER)

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PHILIPPE FORTUIT
CABINET D'AVOCATS

Philippe FORTUIT
Avocat à la Cour
Membre de Sorbonne-Affaires-Finance/Ladef
28 rue Marbeuf -75008 PARIS
Tél: 01 85 73 35 70 - Fax: 01 85 73 35 71
E-mail: pf@pfortuit-avocats.fr

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CABINET D'AVOCATS
Philippe FORTUIT
Avocat à la Cour
Membre de Sorbonne-Affaires-Finance/Ladef
28 rue Marbeuf -75008 PARIS
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E-mail: pf@pfortuit-avocats.fr

Introduction

- Arbitration on energy will be significatively influenced by the new regulations adopted all over the world on energy and especially greenhouse gas and its influence on governance.
- While governance may have been born and developed through soft law rules characterized by the "comply or explain" principle, today it is increasingly governed by hard law rules that are binding on companies. Social and environmental responsibility has become a significant contributor to corporate governance, in the form of obligations to say (**A**) and obligations to do (**B**).
- This transformation is so obvious that the French market authority (AMF) 2022 report is entirely devoted to it. One author observes that "*taking charge of SER issues is in fact part of the director's general mission, which is to ensure, in all circumstances, that the company's interests are defended*" (*IFA, Les administrateurs de sociétés cotées et la responsabilité sociétale de l'entreprise, sept. 2007, p.10*). SER is thus becoming a significant component of corporate governance.
- France has been a pioneer in this major evolution of governance rules, which are now spreading throughout the European Union and beyond.
- Climate change, global warming, the growing scarcity of fossil fuels, minerals and water, and the desire for fair treatment are forcing major projects emerging in the Middle East to incorporate these new rules of governance.

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A) Disclosure obligations and implications for governance

Several reporting obligations have been progressively imposed on French companies and most European companies since 2010:

- French companies with more than 500 employees are required to draw up a (i) balance sheet of their greenhouse gas emissions, accompanied by (ii) a summary of the measures envisaged to reduce these emissions and (iii) a transition plan (article L.229-25,I of the Environment Code, Grenelle II Act of July 12, 2010);

- **"Non financial Reporting Directive" (NFRD)**: French listed companies that exceed certain thresholds are required to draw up **an extra-financial performance declaration**, which must contain a wide range of information on how they take into account the social and environmental consequences of their activity, such as their impact on climate change, their societal commitments in favor of sustainable development, the circular economy, the fight against food waste, etc. (*article L.225-102-1 of the French Commercial Code issued from Directive no. 2014/95/EU of October 22, 2014, known as the NFRD Directive or transposed by Order no. 2017-1180 of July 19, 2017*). The European Commission has published **non-binding guidelines** in 2017 and 2019 on non-financial information containing indicators to be filled in by the company to report on its social and environmental impacts and the measures put in place to reduce or improve its impacts, and to monitor this data over time ;

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- **Corporate Sustainability Reporting Directive "CSRD" transposed in France by a law dated 6 December 2023:** non-financial reporting obligation for listed European companies and large corporations meeting certain thresholds, and in a second phase for listed small and middle enterprises once they meet certain thresholds: description of how societal and environmental obligations are taken into account in the missions of governance bodies: Board of Directors, Supervisory Board, President, Chairman of the Management Board, Chairman of the Supervisory Board; description of how environmental and societal issues are taken into account in the company's strategy (*European Commission, December 14, 2022*).
- Article 40 bis of the CSRD introduces an important novelty : its reporting provisions will apply not only to European companies, but also, above certain thresholds, to foreign companies established on European soil,
- Article 29 ter of the CSRD provides for the adoption by delegated acts of the European Commission, on the proposal of EFRAG (European Financial Reporting Advisory Group), of CSR standards known as the European Sustainability Reporting Standards. These delegated decisions by the European Commission augur well for a significant and rapid increase in CSR rules for the governance of European and foreign companies operating in Europe (*LexisNexis, La semaine Juridique Entreprise et affaires, n°5, February 2, 2023, "La directive CSRD, nouveau modèle du reporting extra-financier au service de la durabilité des entreprises", Béatrice PARANCE*).

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B) Obligation to do or not to do and implications for corporate governance

1) The introduction of SER into company law

- **In France, the PACTE Act of May 22, 2019** gave rise to two important articles in the Civil Code that bring SER obligations within the scope of a company's statutory missions.
- **Article 1833 of the Civil Code** states that "*All companies must have a lawful object and be formed in the common interest of the partners. The company shall be managed in its corporate interest, taking into consideration the social and environmental challenges of its activity*".
- **Article 1835** stipulates that *"(...) The bylaws may specify a raison d'être or reason to be, consisting of the principles which the company adopts and for the respect of which it intends to allocate resources in carrying out its activity*".
- This development, which some dream of seeing become a revolution, accelerates the transformation of governance into a body of mandatory rules: all companies are now concerned by SER obligations, large or small, listed or unlisted, civil or commercial, limited or unlimited liability.
- A company's failure to anticipate SER issues relating to its business could result in its liability being incurred. To guard against this risk, companies are strongly advised to include their SER concerns and the resources they have dedicated to meeting them in their corporate documents and customer communications.

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2) Climate resolutions or "say on climate"

There has been an increase in the number of climate-related resolutions submitted to shareholders' meetings around the world, particularly in the United States, a sign that this environmental issue is becoming a major concern in corporate strategy.

In France, "say on climate" is defined as "*a shareholder vote on a resolution placed on the agenda of a general meeting, at the initiative of the board of directors or one or more shareholders, relating to that company's environmental strategy or policy, and in particular its climate impact*" (*AMF Report on Corporate Governance, December 2, 2021*).

- **Several observations can be made**:
  - climate resolutions provoke a **struggle for influence between the board of directors and shareholders**, who try to impose the presentation at the company's general meeting of binding climate resolutions leading to changes in the company's climate strategy ;

  - **boards of directors assume their statutory role** by personally drawing up the company's climate strategy and then informing shareholders in the form of climate resolutions submitted for their opinion;

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- **the refusal of boards of directors to admit climate resolutions leading to a binding vote is provoking a debate in the marketplace**, which the AMF is calling for to be resolved through legislative intervention.

In a **report published in March 2023**, **the AMF's Climate and Sustainable Finance Commission even recommends that the AMF should be able to take the place of the judge** and become the court of first instance to rule on the admissibility of a climate resolution submitted by a shareholder and refused by the board of directors (Climate and Sustainable Finance Commission, Publication of the Climate and Sustainable Finance Commission: climate resolutions, March 2023). This development is highly significant in terms of the risk of climate norms overturning traditional corporate law rules, and in particular the risk of calling into question the role of the board of directors in defining corporate strategy. This development is no less indicative of the propensity of independent administrative authorities, in this case the Autorité des marchés financiers, to increase their powers, even to the detriment of the judiciary.

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- the debate in the marketplace may be somewhat perplexing: the essential mission of boards of directors is to define and protect the company's strategy, within the framework of the elective mandate entrusted to them by the shareholders. **The position of boards of directors thus appears to be in line with the company's corporate interests and respect for the separation of executive and legislative powers**. A ruling by the Civil Division of the French Supreme Court (Cour de cassation) on June 4 1946, known as the "Motte" decision, affirmed the principle of the independence of corporate bodies, with the aim of ensuring that the General Meeting respects the legal management prerogatives of the Board of Directors: "*A société anonyme is a company with a hierarchy of corporate bodies, in which management is exercised by a board elected by the shareholders; it is therefore not for the shareholders' meeting to encroach on the board's management prerogatives*". A ruling by the Aix-en-Provence Court of Appeal on September 28, 1982 confirmed the application of this principle, and held that limiting the powers of the Board of Directors could only be achieved by amending the company's bylaws, without infringing the rule of separation of powers, so that the Board of Directors must remain in control of the company's management in all circumstances, including climatic issues.

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3) The company's climate legal risk and ecological damage

a) Challenges to a company's climate responsibility

- **The SER commitments imposed on companies give rise to a risk of their liability being called into question in the event of a breach of these SER commitments**, which can be easily detected by comparing the company's published commitments with its climate achievements.
- In a **judgment dated May 26, 2021, the Court of The Hague**, basing itself on Dutch tort law, ordered Royal Dutch Shell to comply with its plan to reduce greenhouse gas emissions, and consequently to reduce its emissions by 45% by 2030, as it had undertaken to do.
- **In France, the same threat hangs over companies all the more so as there is a law on the duty of vigilance of parent companies dated March 27, 2017**, which justifies the commitment of climate actions. This law introduces a duty of vigilance for companies with more than 5,000 employees, which are obliged to draw up a vigilance plan containing the measures they undertake to take "*measures to identify risks and prevent serious infringements of human rights and fundamental freedoms, the health and safety of individuals and the environment, resulting from the activities of the company and those of the companies it controls within the meaning of II of Article L. 233-16, either directly or indirectly, as well as the activities of subcontractors or suppliers with whom we have an established commercial relationship, when these activities are related to this relationship*" (*Article L.225-102-4 of the French Commercial Code*).

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- This law was invoked by associations before the French courts against **Total subsidiaries in connection with an oil development project in Uganda and Tanzania, partly located in a national park**. In a ruling dated February 28, 2023, the claim was dismissed on the grounds of inadmissibility, without prejudice to the merits of the case (*TJ Paris, February 28, 2023, no. 22/53943; TJ Paris, February 28, 2023, no. 22/53942*).
- **On January 28, 2020,** French Non-Governmental Organisations and a number of French cities and local authorities, including the cities of Paris and New York, brought **a suit against Total before the Tribunal Judiciaire de Nanterre, seeking the company's compliance with the law on the duty of vigilance**, and in particular to correct 3 elements: identification of risks resulting from greenhouse gas emissions generated by the company, identification of risks of serious harm, and actions implemented by the company to enable it to comply with the 1.5° objective of the Paris Agreement. The Court has not yet given its verdict. After the TJ of Nanterre denied its competence in benefit of TJ Paris, the last rendered a sentence of inadmissibility caused by the fact that the legal notification would not constitute a sufficient legal interpellation and by the fact that the motives of the summons in justice differ from the terms of the legal notice. If in this case a non-admissibility was judged, all the said new and binding regulation converge to make possible and more probable that a jurisdiction, given that it would receive the claim, could condemn companies for an infringement of SER rules.

- **The legal risk is confirmed** by the fact **that a large number of lawsuits are currently** before the Paris Court of First Instance against major companies such as Casino and Suez and also against the State organization as demonstrated by a recent decision of Tribunal administratif de Paris of December 22nd 2023 that confirms the existence of a risk a condemnation of such a state organization for ecological damage even though in that particular case France managed to escape the condemnation.

- **In Europe**, European Parliament adopted, on june 1st 2023, the directive "CSDD" i.e ***Corporate sustainability due diligence***. Article 1 sets out the subject matter of the Directive, i.e. laying down rules on obligations of due diligence by companies regarding actual and potential human rights and environmental adverse impacts, with respect to their own operations, the operations of their subsidiaries, and the value chain operations carried out by established business relationships; the provision also specifies that this Directive establishes rules on liability for violations of the due diligence obligation.
- **The legal risk is confirmed**.

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b) Ecological damage

- **In France, the oil spill caused by the sinking of the oil tanker ERIKA** chartered by Total gave rise to case law from the Court of Cassation that enshrined **an autonomous ecological prejudice now governed by the law of August 8, 2016**. This ecological loss has **several singular characteristics**:
  - it constitutes **a new category of prejudice in addition to the classically reparable prejudice ;**
  - it **can only be claimed by a limited number of people**, depending on their status and interest;
  - it is **compensated first and foremost in kind**, and if this is not possible, by damages dedicated for the environment or the State.
- **The law** has also created **a number of criminal offences** carrying prison sentences and heavy fines, such as the offence of ecocide, punishable by up to 10 years' imprisonment and a fine of 4.5 million euros, underlining the risk run by companies that underestimate the importance of ensuring sustainable governance compatible with the new SER provisions.

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Conclusion

- In conclusion, one assists to the emergence of implementing, all over the world, of new energy rules and regulation that will govern the economical activity of the planet for the next years.
- The example of France and Europe is particularly demonstrative of this evolution that will conduct to introduce in all contractual relationship the need of the respect of SER regulation.
- Therefore, one can predict increasing claims and disputes about interpretation of these SER rules and organization of use of energy that will constitute a large part of the future litigation and arbitration cases.

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Thank you for your kind attention.