The French Civil Code Steps into ESG Territory

The PACTE law signals the importance of social and environmental considerations, as well as economic growth.

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The so-called *Plan d'Action pour la Croissance et la Transformation des Entreprises,* or PACTE Law, was promulgated on 22 May 2019, further to its review by the French Constitutional Court (Decision 2019-781 DC of 16 May 2019). The law forms part of the French government's action plan to encourage French companies to grow and transform. The French government has noted that the PACTE law represents a *"new phase in the economic transformation of the country"*.

The Civil Code: Encouraging a More Social and Environmental Focus

Notably, a chapter entitled "*Reconsidering the role of partnerships in society*" supplements the Civil Code and the Commerce Code with environment-oriented provisions (*PACTE* Law, Article 169). At first blush, these environmental provisions may seem innocuous, however, they may well have far-reaching social consequences in France.

Previously, Article 1833 of the Civil Code stated: "*All partnerships shall have a lawful object and shall be created in the common interest of [their] partners"*. With the introduction of the PACTE law, Article 1833 is revised to include the following: *"The partnership shall be managed in view of its corporate interest taking into consideration the social and environmental stakes of its activity*." [Emphasis added]

These new environmental provisions celebrate the inclusion of environmental and social responsibility into the Civil Code. The wording of the revisions signals that companies must no longer operate solely in accordance with their economic objectives. Companies also must now be bound by general interest considerations that further reinforce the notion of the corporate citizen, a label that is increasingly used to qualify and to score corporate performance.

That the French government has amended the Civil Code — the backbone of France's legal structure — to pursue this change in approach indicates that modernization is inextricable from wider environmental and social considerations.

The Commerce Code: Managerial Responsibility

Unsurprisingly, the provisions of the Commerce Code that govern corporations have also been amended to reflect the shift towards a more social outlook. Article L.225-35, which sets out the responsibilities of boards of directors, now states: *"the board of directors determines the broad lines of the company's business activities and ensures their implementation in accordance with its corporate interest taking into consideration the social and environmental stakes of its activities"*.

The Code of Mutual Societies (*i.e.*, non-profit corporate private entities) and the Social Security Code, which governs risk insurance institutions (*institutions de prévoyance*), have also been amended to incorporate the change in a similar way to Article L.225-35 (*see* Article L.111-1; L.114-17, and Art. L.931-1; L.931-2, respectively).

These amendments do not create a new corporate responsibility regime. However, a company's failure to consider the social and environmental consequences of its actions may well render either the company or its managers liable to its stakeholders. The bar to any liability will still be high, as the three-part test requiring that fault, loss, and causation be demonstrated, will continue to apply as it does to other types of managerial faults.

What Are the Legal Implications for Corporations?

These amendments are noteworthy in three primary respects. First, they affirm the idea that corporate structures are not managed solely in view of the interests of their shareholders, but also the corporation's own interests. To date, without any such legislation, French courts have had to deal with the notion of corporate interest using their own interpretation. The new wording of Article 1833 provides this with a legislative foundation.

Second, management decisions should no longer be interpreted by the courts only in view of whether they conform to the corporation's interest. These decisions will also be based on whether corporate decision-makers considered the social and environmental consequences of the company's actions.

Lastly, these changes provide a legislative basis for the introduction of the otherwise voluntary due diligence duty of § 2.4 of ISO 26000, which is defined as a "*comprehensive, proactive process to identify the actual and potential negative social, environmental and economic impacts of an organization's decisions and activities over the entire life cycle of a project or organizational activity, with the aim of avoiding and mitigating negative impacts"*.

As such, the new definition of Article 1833 also contributes to expanding the obligations of the Corporate Duty of Vigilance Law of March 27, 2017, which currently captures only a limited number of corporate structures. (Please also see the Latham & Watkins Global ELR blog here.)

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