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An Overview of French Corporate Social Responsibility Legislation for U.S.-Based Multinationals

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There has been a dramatic increase in corporate social responsibility legislation over the last few years. As a result, U.S.-based multinationals are subject to more CSR requirements across more jurisdictions than ever before. France is one of the countries at the forefront of promoting corporate social responsibility through legislation. In this Article, prepared in conjunction with attorneys at French law firm Gide Loyrette Nouel, we provide an overview of French CSR requirements of potential relevance to U.S.-based multinationals, as well as other related developments.

Gender Pay Equity Reporting

In September 2018, France enacted a gender pay equity law, which is intended to help eliminate the pay gap between male and female employees. The law applies to companies with at least 50 employees in France. This includes companies organized under French law as well as other businesses with 50 or more employees in France. Starting in 2020, the law is now fully phased in for all subject companies.

Under the law, subject companies are required to annually calculate their gender pay equity score for their employees in France – which can be a maximum of 100 points – based on specified indicators and using a specified calculation methodology. Payroll software exists that enables companies to automatically calculate their score.

For companies with more than 250 employees in France, five indicators must be taken into account to determine the company's score with respect to those employees:

- The pay gap between men and women, which is calculated based on the average remuneration of men and women by age group and equivalent job category (up to 40 points);
- The percentage gap between men and women's individual pay increases not related to promotions (up to 20 points);
- The percentage gap between the number of promotions between men and women (up to 15 points);
- The percentage of female employees who received a pay increase in the year following their return from parental leave, if pay increases occurred during the year when the leave was taken (up to 15 points); and
- The disparity between the under-represented and over-represented gender amongst the top 10 highest paid employees (up to 10 points).

For companies with 50 to 250 employees in France, the score is instead based on four indicators. The percentage gap between individual pay increases not related to promotions and the percentage gap between promotions (the second and third indicators listed above) are replaced with a single indicator – the percentage gap of pay increases between men and women generally (up to 35 points).

Companies must publish on their website by March 1 their gender pay equity score for the preceding twelve-month measurement period chosen by the company. By allowing companies to choose the measurement period, they can tie the calculation to their fiscal period. The information also must be submitted to the Minister of Labor's Economic and Social

Database (BDES), where it is available to employee representatives and French labor authorities. If companies fail to publish their score on their website – or if they do not have a company website, through another method their employees can access – they are subject to a monetary penalty of up to 1% of their total French payroll for the non-compliant period.

Importantly, the law is not a disclosure-only regulation. In some cases, companies will have to take corrective action. To be in compliance with the law, companies must have a score of at least 75. If a company's score is below 75, it generally then has a three-year period to become compliant. If it fails to do so, it may face a penalty of up to 1% of its total French payroll for the non-compliant period.

Consideration of Social and Environmental Issues by French Subsidiaries

In April 2019, the French Parliament adopted the PACTE Law (translated into English, the Action Plan for Business Growth and Transformation). Among other things, the PACTE Law amended selected provisions of the French Civil and Commercial Codes to expressly address consideration of social and environmental issues in the management of French companies, which would include French subsidiaries of U.S.-based multinationals. More specifically:

- Articles 225-35 and 225-64 of the French Commercial Code were amended to state that corporate and management boards must consider social and environmental issues in relation to their managerial duties.

- Article 1833 of the French Civil Code was amended to indicate that corporations must be managed in their own corporate interests, not just those of their shareholders, taking into consideration social and environmental issues that relate to their business operations. This provision is construed as an obligation to examine these issues in the decision-making process, but not necessarily to opt for the most socially or environmentally friendly option.

- Article 1835 of the French Civil Code was amended to permit corporations to include in their bylaws a "fundamental purpose" or "*raison d'être*," consisting of the justification of the corporation's contribution to society, to be taken into consideration in the conduct of its business. However, we expect very few U.S.-based multinationals to include a *raison d'être* in the bylaws of their French subsidiaries. As a point of reference, only a handful of U.S.-based multinationals are public benefit entities or have established public benefit entity subsidiaries in the United States.

- Article L210-10 of the French Commercial Code also permits companies to use the newly created label of "mission led companies" (*société à mission*), provided they adopt a *raison d'être*, set one or more social or environmental objectives in furtherance thereof and create a mission committee that verifies the pursuit of these objectives by the company. This label is not expected to be used by French subsidiaries of U.S-based multinationals, except perhaps in a handful of instances.

There are no specific penalties under the PACTE Law if a French corporation fails to take social and environmental issues into account. Under existing law, for a company or board member to be held liable for failing to consider these measures in the management of the business, there would need to be fault, damages and a causal link to an alleged harm.

Mandatory Human Rights Due Diligence

The Corporate Duty of Vigilance Law entered into force on March 27, 2017. The law aims to prevent severe human rights violations.

The law applies to a limited number of large French-based companies, as well as a small number of multinationals based outside of France with important French subsidiaries. For most U.S.-based multinationals, if the law has an impact on them, it is because they have an established commercial relationship with an entity that is subject to the law.

Subject entities under the law include any company with its registered office in France that employs, for a period of two consecutive financial years:

- At least 5,000 employees itself and in its direct or indirect subsidiaries with registered offices in France; or
- At least 10,000 employees itself and in its direct subsidiaries with registered offices located within French territory and abroad.

Up-the-chain affiliates and sister companies are not subject to the law unless they independently meet the law's requirements.

Companies that are subject to the law must establish a reasonable vigilance plan to allow for risk identification and the prevention of severe violations of human rights, health and safety or environmental damage resulting from the operations of the company, its subsidiaries, subcontractors and suppliers. Specifically, the vigilance plan must include:

- A risk mapping to identify and analyze the risks of human rights violations or environmental harms in connection with the company's operations;
- Procedures to regularly assess risks associated with subsidiaries, subcontractors and suppliers with which the company has an established commercial relationship;
- Actions to mitigate and prevent identified risks and collect signals of potential or actual risk; and
- Mechanisms to assess measures that have been implemented as part of the company's plan and their effectiveness.

Companies must discuss their vigilance plan with their stakeholders and report on its implementation in their annual management reports.

If a company fails to create, implement or publish a vigilance plan, an interested person may send a written notice of non-compliance to the company. After this occurs, the company has three months to take appropriate corrective action. If the company fails to do so, an interested person may request that a court take legal action. The court may issue an injunction requiring compliance. The law also provided for penalties for non-compliance. However, in March 2017, the French Constitutional Council struck down that portion of the law.

Furthermore, any natural or legal person may seek damages for corporate negligence for any harm suffered that could have been avoided if the company had complied with the requirements of the vigilance law.

Enforcement of the Corporate Duty of Vigilance Law

As expected, civil society organizations are seeking to compel compliance by companies they believe are not meeting their obligations under the law. Notices of non-compliance have been submitted to several companies and legal actions have been initiated, some of which are described below.

- In October 2020, Mexican and international human rights organizations brought suit against a French energy company, alleging that the company has not consulted nor obtained informed consent from the indigenous community affected by the company's planned wind farm project in Mexico. The groups initially issued a notice of non-compliance to the French company in October 2019. This case is pending.

- In September 2020, a group of French, American and Colombian NGOs issued a formal notice to a French company, alleging violations under the law with respect to the company's supply chain practices and alleged purchases from farms involved in deforestation in South America. The NGOs also have requested that the company establish risk-mapping and traceability protocols throughout its supply chains, and introduce an alert system to protect the rights of Amazonian peoples. To our knowledge, the NGOs have not brought suit against the company.

- In October 2019, French and Ugandan environmental groups sued a French oil company in the Nanterre High Court, alleging that it failed to abide by its human rights and environmental diligence plan due to the negative environmental and social impacts of a Ugandan oil project. The plaintiffs requested that the court require the company to remedy the alleged shortcomings in its vigilance plan and implement measures to address violations and risks of violations involving affected local populations. In January 2020, the Nanterre High Court concluded that it did not have jurisdiction to hear the complaint and that the case should instead be pursued in a French commercial court. The plaintiffs appealed the decision to the Court of Appeals in Versailles. On December 10, 2020, the Court of Appeals confirmed the High Court's decision.

- In January 2020, 14 French local authorities and several NGOs filed a lawsuit under the duty of vigilance law against the same oil company, alleging that it is failing to limit its carbon emissions or to mitigate the effects of climate change caused by its operations, and that its climate change plan falls short of the goals set out in the 2015 Paris Agreement. The plaintiffs have requested that the court order the oil company to acknowledge the climate risks related to its business in its vigilance plan, and to take steps to align its business operations with the 2015 Paris Agreement goal of limiting warming to 1.5°C. This case is still pending.

- In October 2019, a notice of non-compliance was submitted to a French digital services company. Several unions sent the company a formal notice under the duty of vigilance law claiming that its vigilance plan did not meet the minimum requirements of the law, particularly with respect to workers' rights. The unions requested that the company remedy these deficiencies. To our knowledge, the NGOs have not brought suit against the company.

Potential Impact of EU-wide Mandatory Human Rights Due Diligence Legislation

The European Commission is expected to propose mandatory human rights due diligence legislation in early 2021. The legislative proposal is expected to, among other things, require subject companies to carry out due diligence to identify, prevent and mitigate actual or potential human rights and environmental impacts in their operations worldwide.

The legislative proposal also is expected to seek to establish a unique standard of care. The draft Directive published by the Committee on Legal Affairs of the European Parliament on September 11, 2020 would require EU Member States to establish civil penalties for violations of the Directive (as transposed into national law), as well as criminal penalties in severe cases or for repeated infringement. Member States also would be encouraged to introduce further legislation to ensure that subject companies could be held liable for damage caused by businesses under their control that commit violations of internationally recognized human rights or international environmental standards if the subject company cannot prove it took all due care to avoid the loss or damage or that the damage would have occurred even if all due care had been taken.

A companion legislative proposal would amend an existing EU Regulation to provide that EU undertakings could be held accountable for their role in human rights abuses in third countries. This proposal would extend the jurisdiction of Member State courts to civil cases against EU undertakings relating to violations of human rights caused by their subsidiaries or suppliers in third countries. This legislation also would give Member State courts jurisdiction (if they do not otherwise have it) to decide civil claims pertaining to human rights violations by undertakings in third countries to the extent those undertakings are in the supply chain of an EU undertaking and the proceedings could not reasonably be

brought or conducted or would be impossible in the third country, and to the extent the claim has a sufficient connection with the Member State.

The Draft Directive would require Member States to transpose it into national law within two years after it takes effect. Accordingly, if adopted, the Directive would apply in France. Member States would not be prohibited from introducing corporate human rights legislation that goes beyond the Directive. Therefore, French mandatory human rights due diligence legislation could impose obligations that go beyond those required by the Directive.

The EU Global Human Rights Sanctions Regime

The European Council issued a new Regulation on December 7, 2020 that allows for restrictive measures against any legal or natural person responsible for, associated with or involved in serious human rights violations and abuses worldwide. Sanctioned persons can be both state and non-state actors.

The Regulation introduces a framework for imposing on sanctioned individuals and entities a freeze on their EU assets and an EU travel ban. Under the Regulation, EU funds and economic resources belonging to, held, owned or controlled by listed persons will be frozen. EU persons also would be prohibited from making funds and economic resources available to sanctioned persons.

The European Union has not yet published an initial list of sanctioned persons.

Climate Risk Disclosures

In August 2015, the French Energy Transition for Green Growth Law, or Article 173, was adopted. Article 173 requires climate-risk disclosures by French asset managers and insurers, which includes the French subsidiaries of global asset managers and insurance companies (as well as by French public companies, banks and credit providers, which are not discussed below). Because of its targeted industry focus, Article 173 does not apply to most foreign-based multinationals operating in France.

Under Article 173 and the subsequent decree issued thereunder, subject entities are generally required to report on (1) the integration of ESG factors into their investment policies and risk management decisions, (2) their exposure to climate change-related risks, which includes both physical and transition-based risks, and (3) the portfolio's alignment with national and international goals to reduce carbon emissions. Institutional investors with a total balance sheet (or belonging to a group with a total balance sheet) of less than €500,000,000 only are required to provide a general overview of how they integrate ESG factors into their investment strategies.

The requirements of Article 173 will be replaced in March 2021 by the EU Sustainable Finance Disclosure Regulation, which was adopted in November 2019. The purpose of the SFDR is to establish harmonized disclosure requirements for financial market participants and financial advisers relating to the integration of sustainability risks and the consideration of adverse sustainability impacts in their processes and the provision of sustainability-related information with respect to financial products.

Other Non-financial Reporting Requirements

In 2017, the EU Non-financial Reporting Directive (the "NFRD") was implemented in France. A statement on non-financial performance ("*déclaration de performance extra-financière*") must be included in the management report of companies that exceed specified size thresholds, which differ depending on whether the company's securities are admitted to trading on a regulated market:

- Companies whose securities are admitted to trading on a regulated market: an average of 500 permanent employees during the last financial year and either a balance sheet total of more than €20 million or a net turnover of more than €40 million.

- Companies whose securities are not admitted to trading on a regulated market: an average of 500 permanent employees during the last financial year and either a balance sheet total of more than €100 million or a net turnover of more than €100 million.

In addition, the NFRD only applies to certain legal forms of corporations, namely *sociétés anonymes, sociétés en commandite par actions* and certain *sociétés en nom collectif*, but not to *sociétés par actions simplifiée* or *sociétés à responsabilité limitée*. It also applies, regardless of their legal form, to credit institutions and insurance and reinsurance companies.

If a company prepares consolidated accounts, the consolidated group is taken into account for purposes of determining whether the reporting threshold is met.

In its statement, the company is required to address how it takes into account the environmental and social consequences of its activities, in particular:

- *Environmental matters*: the consequences on climate change of the company's activities and the use of the goods and services it produces and social commitments in favor of sustainable development, circular economy and the fight against food waste.

- *Social matters*: collective agreements concluded within the company and their impact on the company's economic performance and employees' working conditions, and actions aimed at combating discrimination, promoting diversity and actions taken in favor of disabled workers.

Companies with publicly traded securities also are required to provide information relating to their efforts to address corruption and to respect human rights in the conduct of their business.

Information provided pursuant to the NFRD is provided on a "comply or explain" basis. The information must be made available on the company's website. If the company has more than 500 employees and a balance sheet total or net turnover exceeding €100 million, its statement must be reviewed and certified by an independent third party.

In December 2019, as part of the EU Green Deal, the European Commission committed to reviewing the NFRD as part of the EU's strategy to strengthen the foundations for sustainable investment. The Commission held two public consultations on the NFRD in 2020. The Commission is expected to propose additional legislation in 2021 that would strengthen the Directive.

Potential Liability for Responsible Sourcing Claims

Although not specific to CSR legislation, global brands need to be sensitive to the possibility of French lawsuits arising out of their voluntary CSR disclosures. In February 2018, two NGOs filed a lawsuit in France against the French subsidiary of a large foreign global electronics company alleging misleading advertising practices. The plaintiffs alleged that the labor practices at the group level were not consistent with the ethical commitments published by the company as they were reflected on the French subsidiary's website. The lawsuit led to a judicial investigation in June 2018. In April 2019, the judge determined there was enough evidence to find the electronics company could be held liable for misleading advertising. Once the formal investigation process is complete, the judge will then decide whether the electronics company should face trial in France for the charges.

There have been similar lawsuits in the United States, involving both U.S.-based companies and foreign-based multinationals. For example, class action lawsuits have been filed in both California and Massachusetts under state consumer protection laws in connection with alleged false and misleading CSR disclosures.

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