

May 23, 2019

WITH ENACTMENT OF THE PACTE STATUTE, ALL FRENCH COMPANIES MUST BE MANAGED IN THEIR CORPORATE INTEREST AND MANAGEMENT MUST CONSIDER SOCIAL AND ENVIRONMENTAL ISSUES DERIVING FROM THEIR ACTIVITIES

To Our Clients and Friends:

The French Civil Code provides as a general principle that every company must have a lawful corporate purpose and be constituted in the common interest of its partners.[1] These provisions, which are applicable to all forms of partnership or public or private corporations, have been supplemented by the so-called “Pacte Statute” on the Development and Transformation of Businesses. Each French company must now be managed “in furtherance of its corporate interest” and “while taking into consideration the social and environmental issues arising from its activity”.^[2]

These changes, which affect millions of legal entities from the smallest partnership to the largest public corporation, are a direct consequence of the recommendations of the so-called Notat-Senard Report (“*l’entreprise, objet d’intérêt collectif*”, available at <https://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/184000133.pdf>). Lawyers of Gibson Dunn’s Paris office have been heavily involved in the work having led to this Report.

The Pacte Statute provides that non-compliance with these new obligations is not sanctioned by the nullity of the company.^[3] The intent is to protect companies from the most adverse consequences of a breach of what may appear as a loose obligation.

The Pacte Statute enshrines for the first time in statutory law the concept of “corporate interest” which, until now, had only been set forth by case law. The Pacte Statute, however, does not define the notion of “corporate interest” because “its practical interest rests on its great flexibility, which makes it restive to any confinement in pre-established criteria. The elements necessary to determine whether or not a decision is contrary to the corporate interest are too closely dependent on the multifaceted and changing characteristics of the activity and environment of each company.” (Explanatory Memorandum)

In the minds of the promoters of the Pacte Statute, the acknowledgement of the concept of “corporate interest” implies the endorsement at the legislative level of a fundamental goal in the management of companies, i.e. “the fact that these are not managed in the interest of particular persons, but in their self-interest and in pursuit of their own ends.” (Explanatory Memorandum)

The introduction of social and environmental issues in the management of companies is the most striking innovation. Measuring social and environmental issues in decision-making is meant to force company

managers to question themselves about these issues and to “consider them carefully” (Explanatory Memorandum). This consideration must of course be adapted to each company, including in particular depending on its size and activity.

Ignoring social and environmental issues is not sanctioned by a specific regime of liability. Any court action seeking damages for failure to take into account these matters continues to require the meeting of the standard conditions of liability (existence of a fault, a damage and a causal link between the two). The mere finding of social or environmental damage will therefore not suffice to bring into play the liability of a company or a corporate executive if it is not established that the damage resulted from the misconstruction of such issues.

Ignoring these matters, however, could be a ground for dismissal of the company executive.

The Pacte Statute also provides the possibility for companies to introduce in their by-laws (*statuts*) the pursuit of a *raison d’être* (which conveys, *inter alia*, the notions of founding principles and core values).

The by-laws “may specify a *raison d’être*, constituted of the principles which the company is endowed with and for the respect of which it intends to allocate means in the performance of its activity”.^[4]

According to the promoters of the Pacte Statute, the *raison d’être* “aims to bring entrepreneurs and businesses closer to their long-term environment”. The formulation of a *raison d’être* is to be strategically used, providing a framework of reference for the most important decisions.

Numerous alternative phrasings have been considered in the formulation of these new principles, and Gibson Dunn has been privy to most of the debates on these alternatives and their legal consequences. They do enlighten the legislative intent behind these very significant legislative evolutions and can usefully guide the practical implementation of these new rules.

Several large French multinationals already had adopted a *raison d’être* (like Michelin – “A Better Way Forward”^[5]) and since the parliamentary discussions around the Pacte Statute, many more (like Veolia, Atos or Alstom) have publicly stated their intent to do so.

[1] Article 1833 of the French Civil Code.

[2] “*dans son intérêt social et en prenant en considération les enjeux sociaux et environnementaux de son activité*”. Identical provisions have been introduced in the Commercial Code regarding the powers of the Board of Directors and of the Management Board [*directoire*] of a corporation [*société anonyme*], both of which must determine the orientations of the corporation’s activity in accordance with its corporate interest and taking into consideration social and environmental issues.

[3] Civil Code, Article 1844-10, amended Paragraph 1.

GIBSON DUNN

[4] Article 1835 of the French Civil Code. The Pacte Statute also complements the Commercial Code in this respect. When a *raison d'être* is provided for by the by-laws, the Board of Directors and the Management Board of a corporation [*société anonyme*] must “consider, where appropriate, the *raison d'être* of the company defined in compliance with Article 1835 of the Civil Code”. Articles L 225-35, paragraph 1 and L 225-64, paragraph 1 of the French Commercial Code.

[5] “*Offrir à chacun une meilleure façon d’avancer*”.



Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding the issues discussed in this update. For further information, please contact the Gibson Dunn lawyer with whom you usually work or any of the following members of the Paris office by phone (+33 1 56 43 13 00) or by email (see below):

*Jean-Philippe Robé - jrobe@gibsondunn.com
Bertrand Delaunay - bdelaunay@gibsondunn.com
Benoît Fleury - bfleury@gibsondunn.com*

© 2019 Gibson, Dunn & Crutcher LLP

Attorney Advertising: The enclosed materials have been prepared for general informational purposes only and are not intended as legal advice.