

Corporate reform: From the firm or from the field?

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Abstract:

How to interpret the aspects of the French PACTE Act related to a firm's economic, social and environmental responsibilities? An analysis of the act and of the recommendations made in the Senard-Notat Report brings to light the limits of the commitments demanded from firms in matters related to social and environmental issues and the climate. What if we shift our viewpoint about the firm's part in solving these issues away from ideas centered on the current legal definition of "commercial companies" to demands from the field? Shifting our perspective opens the way toward defining means (including obligations of performance) for a convergence between the rationales of finance and of activities outside finance.

Adopted by the French parliament in April 2019, the PACTE Act for an "*action plan on the growth and transformation of firms*"¹ follows up on an official report (NOTAT *et al.* 2018) that proposed various changes in the definition and governance of firms. Instead of the recommendation of the so-called Senard-Notat report to recognize that a "*firm has its own interests beyond the special interests of its shareholders*", MPs preferred referring to "*social interest*" and letting the board of directors formulate the firm's mission statement. The current legal definition of the firm (Article 1833 of the Civil Code) was then added: a firm has to be managed "*in its social interest, by considering the social and environmental issues related to its activities*". For boards with more than thirteen members, the report had proposed adding up to three more members from among the firm's employees and setting up a committee of stakeholders alongside the board for the purpose of overseeing the firm's strategy regarding its corporate social responsibility (CSR). Though not retaining these suggestions, the PACTE Act did include a provision for creating a special status of "*firms with a mission*" for companies that want to measure their impact in relation to their mission statement (a recommendation from the report). These firms have to state their social, environmental or scientific mission. Assessed with respect to it, they have to commit themselves to having a positive societal impact and making their business model compatible with their mission while fairly sharing the value created.

¹ The text of the PACTE Act (Loi n° 2019-486 du 22 mai 2019 relative à la croissance et la transformation des entreprises) is available via <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000038496102&dateTexte=&categorieLien=id>.

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These points seem to suggest an awareness of the need to see firms as economic agents with a mission to accomplish in society. Nonetheless, since only some firms are to report on their mission, a question arises about conventional firms, which are not asked to be accountable for having a positive impact. So, given the urgent questions of our times, have we made a step forward, or have we been baited?

An act of law out of the air: Are corporate management and global, social and environmental concerns compatible?

Do reforms go far enough to enable us to keep our international commitments for fighting against global warming and promoting a fair, sustainable development, today and tomorrow? Oddly enough, neither the Senard-Notat report nor the PACTE Act is positioned in relation to this urgent, planetary context. The report did, of course, mention the Paris Agreement on the Climate, the collapse of the Dhaka garment factory in 2013 and the Volkswagen emissions scandal; but these events did not shape its thoughts. In this respect, this report, like the PACTE Act, have come out of the air.

The act mentions growth but without qualifying it in any way — even though the GDP, as currently measured, is based on the increased consumption of fossil fuels, which is incompatible with limiting the average world temperature increase to less than 2°C by the end of this century (BOVARI *et al.* 2018). So, there is a contradiction between nation-states' engagements on the climate and the idea that companies should be managed as a function of their interests — without forcing them to verify whether their management is consistent with global, social and environmental, issues and without holding them accountable on this subject. Economic and financial objectives are disconnected from, and still override, social and environmental concerns. While marginal changes might be made to existing practices, a much more radical path should be taken, namely: subordinate a firm's profitability to a priority, namely: its strategy has to take account of social and environmental objectives.

This represents a first, major challenge for those who are trying to change business models and imagine firms as associates in implementing the Paris Agreement. Habitually, we start out from the current situation and look for the way to move in the right direction. Should a different perspective be adopted given the "*schism of reality*" (AYKUT & DAHAN 2015) between official discourses and actual (national and global) trends that are not oriented toward the objective of a sober, carbon-free society? Should we not start from requirements in the field instead of from the firm (from the fertile field instead of the company closed upon itself)? Answering this question means making the choice of whether reforms should be focused on microscopic adaptations of business as usual or else on the disruptive innovations that can truly change things. The PACTE Act is oriented in the first direction. Can corporate practices change this?

The “best efforts” criterion

A first point is that the provisions of the PACTE Act are, overall, less advanced than recent texts of international law. The definition of the CSR by the European Commission in 2011 states that firms are responsible for controlling the impact of their activities, but does not directly formulate the ambit of this responsibility.² This control is to be exercised directly all along the firm’s value chain so as to avoid modern slavery and violations of working conditions, which have to be decent and provide a healthy environment for all employees. This definition is consistent with the United Nations Guiding Principles on Business and Human Rights (UNGPs) about the responsibilities shared by states and firms with respect to fundamental human rights (RUGGIE 2011). It contributed to the act of law, adopted in France in March 2017, about the obligation of vigilance by firms over their subsidiaries and subcontractors. It has also fostered discussions at the UN about drafting a binding treaty on multinational firms, in favor of which the Human Rights Commission voted in 2014.

All these texts of soft or hard law call for holding firms more accountable for the impact of their activities. However these texts suffer from a legal limitation since they are based on a “best-effort” obligation. Surprisingly, the PACTE Act and the recommendations in the Senard-Notat report mainly call for reporting requirements; and they leave to the “firms with a mission” to see how they can meet the requirement about measuring the impact of their activities.

The shared concern for reaching the UN’s sustainable development goals and implementing the Paris Agreement on the Climate means trying to achieve a convergence between financial and extra-financial rationalities and to change rules and regulations at the planetary level (in particular with regard to accountancy and taxes) in order to avoid the disasters that have been predicted were the rat race to continue. We must decelerate, foster a collective sobriety to tame plans for voraciously consuming minerals and fossil fuels — not to impose austerity but to boost a sustainable quality of life. Just as the GDP metric is not adapted to social and environmental issues, corporate strategies must take account of the climate and social bonds. It comes as a surprise that recommendations (such as those made by the Task Force on Climate-Related Financial Disclosures in 2017,³ which have been adopted by the EU’s High Level Expert Group on Sustainable Finance)⁴ are mentioned but without any stringent conclusions being drawn about the need to change the law (apart from the reporting requirement for investors in Article 173 of the act on the energy transition).

² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions “A renewed EU strategy 2011-14 for Corporate Social Responsibility” (COM/2011/0681) available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52011DC0681>.

³ Established by the Financial Stability Board (CSF), the Task Force on Climate-Related Financial Disclosures issued its report in June 2017. It has proposed an international framework for corporate reporting so that investors can better assess the climate-related financial risks stemming from the activities of the firms in their portfolios. It has insisted that firms should not just report information for climate indicators but also report on how a firm’s governance, strategy and risk-management processes take into account climate-related risks and opportunities. The task force’s report thus asks us to assess the sustainability of a firm’s business model in relation to the climate. Cf.: <https://www.fsb-tcfd.org/wp-content/uploads/2017/06/FINAL-2017-TCFD-Report-11052018.pdf>.

⁴ In early 2017, the European Commission asked the High Level Expert Group on Sustainable Finance (HLEG) to make recommendations about sustainable finance. The final report, which came out in January 2017, served as the basis for the action plan on sustainable growth issued by the Commission in March 2017.

Even though the task force's recommendations mainly have to do with the means for firms to use and do not, therefore, impose obligations of performance related to the impact of their activities, they do underscore the structural nature of the fight against global warming in the fields of corporate governance, strategy, risk management and the assessment of engagements. They are more ambitious than the PACTE Act since all firms (and not just a few virtuous ones) are to be involved in the fight against climate change. Firms are to be held accountable for their strategies, their actions in view of the consequences of scenarios about a rise of 2°C on their business activities. They are to publish data on greenhouse gas emissions all along their value chains.

Many proposals have been made, by researchers and international institutions; and the resources exist for devising new metrics consistent with climate-related and societal objectives: in particular, for fighting against fiscal optimization and tax evasion (both harmful) thanks to country-by-country reporting and the establishment of a common, consolidated tax base for corporations (*e.g.*, the EU's ACCIS directive); for adopting a different accountancy for nature and human beings so as to integrate the cost for society of maintaining and developing natural and human wealth (RICHARD & PLOT 2014); for fighting against differences in income that are lethal for our society and for the planet by reducing pay differentials in firms and adopting progressive taxes (ATKINSON 2016, GIRAUD & RENOARD 2012); etc.

The inertia of thinking inside the box

Nevertheless, the inertia or even active opposition of decision-makers is clearly perceptible. There are many reasons for it, ranging from theoretical justifications of the *status quo* to practices mainly intended to pursue short-term financial interests. Without describing these reasons in detail, I would like to point out that one of the deepest reasons is cultural, epistemological — related to our way of thinking and our frequent inability to think outside the box. Arendt described the spiral whereby something goes radically wrong. We must think not only outside the box of existing rules but also outside the box of our ways of looking at the world, nature, living beings and our own existence. The inertia is so strong because the coming changes imply a transformation of our conception of the world and of our place therein, a transformation that will deeply affect our societies, which have been conditioned by liberal ideals about individual autonomy, unlimited growth and a winner-winner convergence of interests.

The concern for autonomy has to be combined with an awareness of our interdependence, interdependence on each other and on nature; the concern in creating wealth, with an awareness of planetary limits; the concern with harmony, with the recognition of the violence that our economic and political systems wreak on the weakest and on all beings who are kept out of the process of making decisions for which they will have to pay. We cannot advance if we still act in a segmented way, as if complex solutions could be imagined by juxtaposing capacities for innovation alone, by supposing that some actors need but increase collective wealth for others to redistribute it. We must devote thought to the conditions for a fair creation and sharing of value, by adopting a holistic view of our planet's limits and of the impact of our firms on "neighbors" distant in space and time. This implies

forsaking certain types of activities and practices, even though they create short-term value (DUGAST & SOYEUX 2019).

Although firms are not to define the general interest, they should have the obligation to help do so. They should be held accountable for the compliance of their objectives and activities with these finalities, and for their results and not just for the means used or their “best efforts”.

Starting from the field

To transform economic models in view of these prospects, which are meaningful, we must start from the field — considered both to be the natural, cultural and living environment where we undertake activities and to be the actual experience, the bonds woven between actors coming from different worlds who endeavor to find solutions for a world in common. For this grounded diagnosis, we can prefer the doughnut economic model (RAWORTH 2017), the development of activities between a social foundation and an environmental ceiling (GIRAUD & RENOARD 2012). Only this vision will allow for collective decisions and norms on par with the issues. The work has been clearly identified. To their credit, the Senard-Notat report and then the PACTE Act mentioned this work. What remains is to undertake it by starting with the targets and not with the perception of short-term power relations.

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