

“Intérêt social” and “raison d’être”:

Thoughts about two core provisions of the Business Growth and Transformation Action Plan (PACTE) Act that amend corporate law

Alain Pietrancosta

Professor, Sorbonne Law School

[special issue of *Réalités Industrielles*, November 2019]

Abstract :

The Business Growth and Transformation Action Plan (PACTE) Act of 22 May 2019 has the clear goal of “reviewing the position of businesses within society”. Along with the introduction of a special “*société à mission*” (similar to a community interest company) status, it makes two major amendments to French corporate law in its Article 169, one of which is mandatory with the other being optional. The first adds a second paragraph to Article 1833 of the Civil Code which provides that a company “shall be managed in its “*intérêt social*” (corporate interest), factoring in the social and environmental issues raised by its business activity”. Whilst it can be said that this addition is not likely to shake up our vision of corporate interest, it does give rise to nagging questions about its legal and practical repercussions. The second allows companies to include a “*raison d’être*” (central purpose) in their articles of association. Although use of this entitlement may sometimes amount to a public relations stunt, it does nevertheless carry a number of major legal consequences which should be taken into account.

The PACTE Act of 22 May 2019 aims at no less than “reviewing the position of businesses within society”. Its advocates are looking to move away from a business model that President Macron has described as “ultraliberal and financial capitalism, often steered by short termism” and support the determination, as underscored by the Minister for the Economy, Bruno Le Maire, that companies should assume societal responsibility and fully contribute to the common good. Far from damaging our businesses’ competitiveness, this objective is grounded in the notion of conciliation – or reconciliation – of long-term economic profitability with attention to social and environmental issues.

This rationale warranted the inclusion in the PACTE Act of a series of provisions amending corporate law which quickly became likened to a three stage rocket: first, an overhaul of the concept of corporate interest by explicitly requiring the social and environmental issues relating to the company’s business activity to be taken into account; second, the option for all companies to include a central purpose in their articles of association; third, conditional entitlement for a company to mention the status of “*société à mission*”. The specific nature of the latter status, which resembles breakthrough innovations and, above all, the special treatment to which it is subject in this article, mean that our comments will be limited to the first two above-mentioned legislative reforms, which have been included in the Civil Code, to their more widespread influence or their media coverage due, for the first, to its mandatory nature and, for the second, to the apparent enthusiasm displayed by our major businesses.

Mandatory factoring in of social and environmental issues as part of company management

The PACTE Act amends Article 1833 of the Civil Code, which is a common provision that applies to all French companies. The article previously simply provided that a company shall “have a legal purpose and be formed in the common interest of the partners”. A second paragraph has been added: “A company shall be managed in its corporate interest, factoring in the social and environmental issues raised by its business activity”.

This amendment was subject to lively discussions and widespread media coverage. This was due to the legally binding nature of the text, its broad application and scope, and even its symbolic power as it altered an overarching provision of ordinary corporate law which, being almost unchanged since the time of Napoleon I, represents one of the legal cornerstones of our economic model. The goal of this revision, which is itself engrained into law, namely “reviewing the position of businesses within society”, was a legitimate cause for concern.

The idea that this Article 1833 needed revising had actually been floated a number of years previously and had been fuelled by the 2007-2008 financial crisis by generating a train of thought conducive to the dissemination of pro-stakeholder doctrine as a reaction to the alleged excesses of pro-shareholder doctrine. This was actually an expression of a doctrinal and regulatory cycle whose roots were much older and deep-seated...

The report “*Pour une économie positive*” (For a positive economy) issued by the Attali Commission in 2013 contained an initial proposal to “conduct an in-depth review of corporate objectives” and advocated a multi-fiduciary model referring to “the plural interest of stakeholders”. In 2015, Emmanuel Macron, who was at the time Minister for the Economy, revived the idea put forward by the Commission, of which he had been Secretary General, while objectivising the wording to refer to the “higher interest” of the company in line with the “general economic, social and environmental interest”. However, the attempt failed due to criticism concerning its timeliness or even its constitutionality. Once he had been elected President, he resumed the planned reform by including prior discussions and interviews – BercyLab and the Notat-Senard report – in order to increase the odds for reaching an acceptable compromise between the desire for a strong political signal for the measure, which could only be materialised by revising the Civil Code, and mitigating the related legal risks. This compromise was achieved under the above-mentioned terms which, as I am a lawyer, call for a number of comments which are set out briefly below.

First, it should be noted that the new paragraph of Article 1833 represents the first general provision requiring that companies be managed in their “corporate interest”. This is a pronounced redundancy as it infers that a company has interests other than its corporate interest. However, while the PACTE Act broadly enshrines the concept of corporate interest, to which special regulations already make many references, it fails to define it, thus following the line adopted by the commercial lawmakers in 1966 who stressed that the concept needed to remain flexible and was naturally resistant to any containment. The lawmakers’ intention is clear or, in any case, that of recognising the own interest of a company taken as an entity, an interest that is higher than the special interest of all its stakeholders including partners. The two successive paragraphs – the company shall be formed in the common interest of the partners; it shall be managed in its corporate interest, which includes social and

environmental issues – confirm the interpretation. If truth be told, the new wording broadly reflects French case law which leans towards an open concept for corporate interest and, therefore, one that is not limited to maximising the shareholder value as has been often alleged during discussions. As far as we are aware, no French court has sentenced a corporate officer for having failed to maximise shareholder value.

The relationship in the lawmakers' minds between the company's own interest and the long-term is less clear but is an underlying concept. It could even be that reference to social and environmental issues is intended to include the long-term in the corporate decision-making process. It has been suggested that the long-term has now become a short-term imperative and "patient capitalism" is being touted, based on the Rhenish model. However, in fact and in law, things are less certain. Without mentioning companies that have no long-term purpose and the existence of short-term social and/or environmental issues, corporate decision-making is often inter-temporal and taking account of this should, at least in theory, be guaranteed.

Next, it should be noted that reference to **factoring in social and environmental issues** is, in itself, more innovative and therefore raises a number of questions.

Certain relate to its **scope of application** which may, due to the authority to take discretionary decisions, be viewed as too narrow from one angle and too wide from another. It is too narrow as the legislation only applies to companies. Why is there this restriction? Why does it not include all forms of company, collective as well as individual, or even extend to other economic contracts? The reasons have never been explained. And, in addition, discussions have flagged up huge confusion between the terms "*sociétés*" and "*entreprises*". The Environmental Charter, as interpreted by the Constitutional Council, already imposes a due diligence obligation regarding damage to the environment on all persons. On the other hand, the scope is too wide as the reform affects all companies, irrespective of their size or the substance of their social or environmental impact. Whereas, traditionally, CSR provisions only applied to major companies and were limited to transparency requirements, thousands of SMEs are now subject to a provision laying down a significant social and environmental obligation.

However, and quite naturally, the **legal and practical ramifications of the reform** have raised and are continuing to raise the most concerns as they seem highly uncertain and hard to identify *a priori*. It is currently difficult to assess the extent to which existing substantive law and practices have been altered.

It can certainly be foreseen that the reform will not cause a shake-up in this respect. There are strong stabilisers due, primarily, to the legal purpose of companies remaining “as is”. This purpose is set out in Article 1832 of the Civil Code and is central to the actual definition of a company which essentially exists to make profits and to share them out among the partners. Also of importance is the power of partners who are solely responsible for shaping the company’s destiny and, possibly, for interrupting it.

The fact remains that taking into account the social and environmental issues relating to corporate activity is now expressly mentioned and is set forth in the form of an obligation. This flies in the face of the arguments put forward by its advocates who have constantly stated that this reference does not create a new obligation but was rather intended to provide legal certainty to companies carrying on social and environmental type business activities. This interpretation has been partly refuted by efforts made during the discussions to mitigate this fresh restrictive standard. An example was the replacement, at the suggestion of the *Conseil d’État* (French Supreme Administrative Court), of the words “*en considérant*” (considering) by the expression “*en prenant en considération*” (factoring in) or the elimination of nullity in the event of actions and deliberations contrary to the new paragraph 2 of Article 1833. As regards the law governing *sociétés anonymes* (public limited companies), and this law alone, for an unexplained reason, the management bodies – board of directors for companies with a board and general management (*monistes*) and the management board for companies with this board and a supervisory board (*dualistes*) – are tasked with setting the targets of corporate activity and ensuring their implementation, in line with the corporate interest, by factoring in the social and environmental issues relating to their activity.

Initially, the sense and scope of this factoring in are set to be defined incrementally as corporate practices, which are currently finding their feet, evolve and possibly subsequently according to legal interpretation. This means that clarification will take some time. When cases are referred to the courts, we could expect an interpretation which, if not minimalist, would be at least reasonable. On paper, the PACTE Act actually only lays down a slight requirement: to take account of the social and environmental issues related to the company’s business activity. The result is an *ex ante* obligation, which is binding on managers, to familiarise themselves with these issues and to document how they are taken into account. This will very likely be adapted depending on the relevant company’s social and environmental impact. Above and beyond this procedural consideration, the sensitive question of the material or substantive scope of this constraint needs to be decided on. It cannot be envisaged that it would lead to a ban on a company closing a plant or to a manufacturer of spirits, tobacco or weapons being forbidden from continuing its business activity. The interest of the entity as a whole must remain an imperative and it should not be forced to take decisions that would compromise its competitiveness or even less its viability. The litmus test will be to see whether, after a company has addressed social and environmental issues, it remains totally free in its movements or if, faced with equivalent options, it is necessary to choose the one which mitigates the negative external impact for the company and the environment.

There are significant challenges here as they concern interference by third parties and the courts in corporate affairs, the invasive nature regarding basic rights and freedoms of a provision that obliges a private person to act, even partially, in the place of the government, in the interest of the community or even in the interest of nature, when he/she has not agreed to do so and without specially determining his/her obligations in this respect. Concerns could also be raised about the risk of manipulation of a provision that is too broadly interpreted, especially in major companies with a dispersed ownership structure, by groups of activists with strong “social” and “environmental” credentials against management which is alleged to take a short-term approach. This is even more relevant as, unlike American or English law, French law does not freeze the entitlement of any person with interest to act to institute civil liability proceedings against a company and its managers; does not make formal provision for managers acting diligently and in good faith to have room for manoeuvre in management choices through a concept that is equivalent to the business judgment rule; and the elimination of the nullity risk introduced by the PACTE Act is still incomplete. Conversely, we should be wary of the use made of this by certain corporate officers in order to bolster their position vis-à-vis shareholders who are seen as being over-demanding in terms of economic performance levels, like the constituency statutes adopted in the United States in the 1980s to address the wave of hostile takeover bids.

It could thus be hoped that a different interpretation will win out, one that is based on the idea that it is, in principle, in the best interest of the company and its partners to take account of social and environmental issues. It could be hoped that a company with a long-term goal would not compromise its own expansion by ignoring the social and environmental issues which are seen as the most important by its employees, customers and partners. This means that it would only be if this factoring in fostered the global corporate interest that it should be followed by effects. This interpretation is consistent with the parliamentary amendment that sought to reconnect taking account of social and environmental issues and the corporate interest by replacing the conjunction “and”, which separated them in the original legislation, with a comma. Nevertheless, while it is true that a certain convergence of vested interests is assumed to exist in the long-term, the facts encourage tempering and management imperatives call for trade-offs which are sometimes delicate...

The new entitlement to include a central purpose in articles of association

The same article of the PACTE Act adds a sentence to Article 1835 of the Civil Code stating that a company’s articles of association may mention its central purpose. This is therefore an option being offered to French companies.

Once the central purpose of companies was clear as it was established by the search for wealth generation. Now, this rationale appears – or reappears – as a provocation or, at the very least, inadequate. The preparatory work highlighted the importance of giving “meaning to the collective purpose that is the enterprise”, expressing for this “a desirable future”, carrying on “a search for consistency”, describing “the company’s identity and vocation”, “a design, an ambition or any other general consideration tending to underscore its values and long-term concerns”. There is no doubt that this new legal concept is somewhat hazy, or “inconsistent”, according to a politician. In spite of the call for greater detail from the *Conseil*

d'État, an amendment simply added that this central purpose is “composed of principles assumed by the company which will be complied with by the allocation of resources in carrying on its business activity”. It is telling to note that, at a time when we are starting to talk about automation and artificial intelligence applied to corporate governance, lawmakers are asking firms to carry out a psychological or even psychoanalytical introspection exercise to address their reason for existing and depict their superego...

Whatever the case, the practice bears witness to a certain interest for this new unidentified legal purpose, especially with major companies. Atos was the first to include a central purpose in its articles of association, namely to “help design the future of the information technology space”. At Veolia Environnement, it is summarised by the slogan “resourcing the world”; Carrefour, “becoming the world leader in the food transition for all”; Michelin “offering everyone a better way forward”; Total, “supply to as many people as possible a more affordable, more available and cleaner energy”; Sanofi, “prevent, treat and cure as many patients as possible”; Safran, “sustainably contribute to more open, comfortable, safe and clean access to the sky”; PSA, “ensure the freedom of movement by providing a safe, sustainable, affordable and enjoyable mobility, for as many people as possible”. It would seem that, *a priori*, coming up with a central purpose is easier for a single-activity company than for a conglomerate...

Cynics could claim that the exercise is simply an innovation competition for fashionable virtues, a catalogue of good intentions and slogans. Lawyers need to consider the legal reach of these public declarations. Basically, we do not believe that the central purpose should represent a final purpose that competes with the lucrative one for which the company is formed; it is rather a description of the way in which the company intends to act to achieve this goal. This should, *a priori*, protect those controlled listed companies that decide to refer to it from requests for a public repurchase from naysaying minority shareholders.

Nevertheless, this does not mean that it has no specific legal effects. One effect is explicitly detailed for public limited companies as it is stipulated that the board of directors is compelled, when carrying out its duties, to factor in the company’s central purpose (Article L.225-35 of the Commercial Code). It is surprising to note that lawmakers failed to deactivate the cancellation of corporate acts and deliberations if this central purpose is not taken into account. Outside public limited companies, proceedings for civil liability and removal of managers for disregarding the corporate central purpose are still possible. There is also the matter of the requirement for involving the social and economic committee in defining it. Ultimately, the extent of legal risks will be dictated by how precisely the central purpose is defined. Practices vary fairly widely in this respect.

Due to the legal ramifications of including a central purpose in a company's articles of association, use of central purposes which are not listed therein could be open to criticism. Some may take a dim view of companies, the majority at present, promoting a central purpose in order to benefit from the related impact on image without including it in their articles of association with the approval of the general shareholders' meeting and thus exposing themselves to the special resulting legal risks. If companies fail to follow the legal line for benefiting from a specific signalling effect, due and proper information to the market and fair competition between companies may not be assured.

Bibliography

Reports

Notat N. and Senard J.-D. (2018), "L'entreprise, objet d'intérêt collectif".

Club des Juristes (2018), "Le rôle sociétal de l'entreprise – Éléments de réflexion pour une réforme", April.

Articles

Couret A. (2017), "Faut-il réécrire les articles 1832 et 1833 du Code civil ?", D. 2017, p. 222.

Grossi I. (2019), "L'intérêt social élargi, quel(s) intérêt(s)", *Journal des sociétés*, no.172, April, p. 13.

Lucas F.-X. (2018), "L'inopportune réforme du Code civil par la loi PACTE", *Bull. Joly Soc.*, no. 118z0, September, p. 477.

Poracchia D. (2019), "De l'intérêt social à la raison d'être des sociétés", *Bull. Joly Soc.*, no. 119w8, June, p. 40.

Roussille M. (2019), "Projet de la loi PACTE : quel impact ? Réflexions sur la consécration de l'intérêt social et de la raison d'être de la société", *Dr. sociétés* 2018, study 10.

Schmidt D. (2019), "La loi PACTE et l'intérêt social", D. 2019, p. 633.

Tadros A. (2019), "Regard critique sur l'intérêt social et la raison d'être de la société dans le projet de loi PACTE", D. 2018, p. 1765.

Viandier A. (2019), "La raison d'être d'une société" (C. civ. art. 1835), *BRDA* 10/19 inf. 30.

Dossier "La réécriture des articles 1833 et 1835 du Code civil : révolution ou constat", *Rev. sociétés* 2018, pp. 551 et seq.