

Comparative Lessons on Corporate law and CSR: Hard Law as Solution? Do the French offer the way ahead?*

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Abstract: This paper provides a comparative analysis of corporate law and CSR and asks whether there are lessons for Australia from corporate law and CSR developments in France. This presentation presents a summary of the provisions of the new French Act Number 2010-788 passed on 12 July 2010 – called “Grenelle 2” –. Firstly, article 225 of Law’s Grenelle 2 changes the Commercial Code to extend the reach of non-financial reporting and to ensure its pertinence. Secondly, article 227 Law’s Grenelle 2 amends certain provisions of the Commercial and Environmental Codes and incorporates into substantive law the liability of parent companies for their subsidiaries. *In fine*, article 224 of Law’s Grenelle 2 reinforces the pressure on the market to act in a responsible manner. It modifies article 214-12 of the Monetary and Financial Code in order to compel institutional investors (mutual funds and fund management companies) to take social, environmental and governance criteria into account in their investment policy.

Key-Words: French regulatory evolution, Law’s Grenelle 2, Governance, Consequences, Non financial reporting, Socially responsible investment, Asset managers, Obligation, Subsidiaries, Liability of parent companies, Criticisms.

* The style of the presentation in the international conference ALTA has been kept.

This presentation exposes the last evolution in France concerning CSR: Law's "Grenelle 2". Law's Grenelle 2 is the non official name of a law adopted on July 12, 2010 as Law Number 2010-788 entailing National commitment for the environment. This law causes a great reform of the juridical landscape in France. Indeed, the aim of this reform is simple: integrating the environment in global French law (building law, environmental law, public market law, corporate law, financial law). In Law's Grenelle 2, one chapter concerns specifically the problematic of governance. The implications of this evolution are crucial for the future of CSR in France. Several articles (224 to 227) show the French's choice for hard law and mandatory rules to promote CSR and go forward of the unsatisfactory situation. The Law's Grenelle 2 adopts a three steps process to implement CSR: increase the transparency (I), create obligation and develop liability (II) ... this is the trilogy used by the French legislator. My presentation examines the strengths and weaknesses of new rules as included in France through Law's Grenelle 2. In twenty minutes, my commentary synthesises relevant legal issues and identifies some critical aspects.

I – TRANSPARENCY: GO FORWARD WITH ARTICLE 225 OF GRENELLE 2

In response to the indivisibility of business activities and CSR and the relevancy of information relating to their interaction to investors and other stakeholders, France's Assemblée Nationale (the French Parliament) reinforced mandate non financial disclosure as part of its law of July 12, 2011. For remember, this disclosure was introduced on May 15, 2001, Article 116 of the Law's NRE – *Nouvelles régulations économiques* – which required all French corporations listed on the first market – *premier marché* – (and thereby possessing the largest market capitalizations) to annually report on the social and environmental impact of their activities. Article 116 becomes Article L. 225-102-1 of the French Commercial Code.

A) A BRIEF HISTORY OF THE GRENELLE 2: SOME FLAWS

This law changed Article L. 225-102-1 of the Commercial Code concerning the content of annual reports to be filed by publicly-listed French companies. Article 225 of Law's Grenelle 2 aims to extend the reach of non financial reporting. Indeed, several criticisms address to law NRE and his Decree of Number 2002-221 on February 20, 2002. This Decree completed France's NRE and established nine separate categories of social information that must appear in the annual reports of listed French corporations. Similarly, the Decree provided nine categories of information for disclosure with respect to the environmental consequences of corporate activities.

While a review of the implementation of this earlier law shows some progress made by listed French corporations, the Decree's social and environmental disclosure requirement has been subject to widespread criticisms from report of ministries or market financial authority – *AMF* –, opinions of NGO or private groups (i.e. ALPHA group), studies of academics or experts.

First, studies revealed that low number of corporations (around 20 %) adequately complies with the Decree or would produce reports far short of stakeholder expectations. Second, critics noted that the Decree did not establish specific indicators and methodologies to be used in the reporting process..

Third, the lack of non financial auditing requirements and sanctions for noncompliance also were cited as evidence of the Decree's inadequacy.

At last, critics concluded that mandated disclosure was fullness (for instance, what about Human rights or bribery?) and ignored the situation of non quoted corporations.

B) THE DISCLOSURE REQUIREMENTS OF THE GRENELLE 2: BETTER AND BETTER

What are the relevant elements of Law's Grenelle 2? There is a serious reinforcement of the mandated non financial disclosure.

First, Article 225 expands the perimeter of corporations concerns by the mandated disclosure. Now, the rule goes beyond corporations that are publicly listed in France:

- Corporations exceeding threshold (fixed by future Decree) in number of turnover and salaries;
- Benefit societies, federations and unions;
- Investment enterprises, Financial societies, Banking enterprises ;
- Insurance societies and certain cooperatives;
- Public corporations.

Second, the scope of the non financial information is extended. Article 225 fits to the social and environmental disclosure the societal commitment of the corporations.

Third, about the non financial information, Article 225 of Law's Grenelle 2 imposes the adequacy between those and international and European standards. The new rule implemented in France recommends a framework to be used in satisfying the disclosure requirements. Moreover, Article 225 asserts that the methods of presentation of non financial information must allow comparing social and environmental impact between corporations.

Fourth, there is a defined process by which companies must audit or verify the information set forth in their non financial reporting. A future Decree will determine the verification of the non financial information by an independent auditor. But, Article 225 fixes the general framework of the auditor's task: publication of an advice communicated to the shareholders in the same time of the annual report and publication of an attestation on the presence of non financial information required by the law.

C) **THE UNCERTAINTIES OF THE GRENELLE 2: AN ASCERTAIN FULL EFFECT**

Does Law's Grenelle 2 enable to give a complete answer? Law's Grenelle 2 requirement is not flawless. Different questions should be asked.

While Article 225 constrains French corporations to report on a set of non financial indicators, it does not describe with any degree of detail how this is to be accomplished. For that, we are waiting for the adoption of a future Decree. It would be passed few

weeks after the adoption of Law's Grenelle 2 ... but we still wait for! The primary project of this text in progress has already been subject of serious criticisms.

Furthermore, the identity of the corporations which are required to publish non financial information is considerably debated. The compliance with Law's Grenelle 2 for important part of companies in France (SARL and SAS) is clearly uncertain.

While the external stakeholders were expressly present in Article 225, a later reform removed this reference.

II – RESPONSIBILITY: MARKET PRESSURE AND LEGAL ENFORCEMENT WITH ARTICLES 224 AND 227 OF LAW'S GRENELLE 2

On the one hand, Article 224 introduces innovative requirements for asset managers and Open-End investment companies – *OPCVM* in France – to constrain them to take into account the social responsible investment (SRI) in their decision. On the other hand, Article 227 breaks with the traditional French analysis in corporate law that considers each corporate structure as an individual entity. It is the famous problem of group of companies.

A) THE NEW RESPONSIBILITY OF COLLECTIVE INVESTMENT IN TRANSFERABLE SECURITIES: FALLACIOUS GOOD IDEA?

Law's Grenelle 2 establishes new obligation in order to favour CSR. Article 224 of Law's Grenelle 2 changes Article 214-12 of the Monetary and Financial Code in order to motivate the institutional investors (mutual funds and fund management companies) to take social, environmental and governance criteria into account in their investment. Until Law's Grenelle 2, French legislation pushes forward more transparency. The regulation of the market financial authority imposes on the asset managers to disclose in their Statement of Investment Principles the extent (if at all) to which social, environmental or ethical considerations are taken into account in the selection, retention and realisation of investments. Moreover, the exercise of the rights (including voting rights) in relation with their politics to the investments must be disclose. The French requirement may be viewed

as a continuation of the emerging trend mandating such disclosure Western Europe (for example: UK, Denmark, Germany, Italy) as well as elsewhere (i.e. Australia). These regulatory systems have numerous differences in scope, in object or in content. But, the whole of the rules have a common feature: imposing the transparency in politics investment and in the exercise of the voting rights.

Article 224 is more intense and emphasizes the CSR movement through SRI. There is a growing interest in SRI in France. For example, *Novéthic* – a resource center for persons seeking information on socially responsible investing – shows that France is leader in management of socially responsible asset and that the amount of SRI has grown of 70 % at the end of 2009. If the legislative movement had begun with two laws adopted in 2001 relating to Reserve fund of the pensions and Workplace savings, it becomes more present now. Asset managers and Open-End investment companies have to integrate non financial criteria. Hard law is used, all managers of collective investment are covered and sanction is possible. Nevertheless, critics could be noted. Firstly, the nature and the effectiveness of the sanction by French jurisdictions are uncertain and complex. In fact, no specific sanctions are adopted. Secondly, the current rule of law ignores an important part of SRI: those managed by unit trusts – *Fonds commun de placement* –. Thirdly, what is the real future of SRI in France (and in the financial world) without coherence of the non financial information?

B) THE NEW LIABILITY OF PARENT COMPANIES: THE IGNORANCE OF FOREIGN SUBSIDIARIES

Article 227 of Law's Grenelle 2 is the product of the scandal caused by the case law "Metaleurop". Company Metaleurop was a subsidiary exploiting polluted sites. It was in insolvency procedure and faced with the impossibility to take care of the operations of cleanup. Finally, this company was abandoned by his parent company and disappeared.

Article 227 of Law's Grenelle 2 changes provisions of the Commercial and Environmental Codes. The liability of parent companies for their subsidiaries is

incorporated in rules of law. This is a revolution. There were cases law which piercing the veil of personality, but now ... it is the Law! Article 227 of Law's Grenelle 2 systemises the definition of the existence of any fault committed by a parent company and sets the legal limits on responsibility for the environmental obligations of any subsidiary. While Article 227 (first paragraph) is about a voluntary liability, Article 227 (second paragraph) is concerned with a liability based on a fault. The first liability is founded on an optional commitment of the parent company. The second liability is depending on a fault having contributed to the financial difficulties of the subsidiary.

However, there are significant gaps in the liability of parent companies provision. The Law's Grenelle 2 fails to fully address the difficulties of complex corporate structure. The definition of the term « subsidiaries » raises a serious problem: foreign subsidiaries are excluded from new rules. Consequently, this exemption discounts the future impact of Law's Grenelle. In addition to that common criticism, other features of the law merit discussion: possibility to modulate the extent of the voluntary liability, exclusion from the one-sided commitments of the voluntary liability.

In conclusion, the future outcomes of Law's Grenelle 2 are difficult to assess. Nevertheless, we can say that there is a new dynamic in France, more global (non financial reporting, SRI and liability of parent companies) and perhaps more advanced compared to EU and OECD.

	DISCLOSURE	SRI	PARENT COMPANIES
FRANCE	++	++	+
EU	+	0	-
OECD	+	+	-