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Grenelle II : Environmental Law and Corporate Governance – What's New in France?

The Grenelle Process

Starting in May 2007, the French Government launched a major environmental initiative called "Grenelle de l'environnement" in reference to a negotiation process involving the Government, employer organizations and trade unions which closed the 1968 "Events". In this new process, the idea was to bring together these stakeholders, plus NGOs and local authorities, and quick-start major environmental reforms.

Six working groups considered, over a five-month period, the entire spectrum of environmental issues (climate change and energy, biodiversity, environment and health, production and consumption, governance and transport), giving rise to some well-publicized debates, with occasional input from the public and experts. Environmental awareness in French society benefited greatly. The process also resulted in two major pieces of legislation and a national strategy for sustainable development.

The first piece of legislation (the Grenelle I Act) was intended to be a framework for the State's future action; it was unanimously adopted by French Parliament on August 3, 2009 and set national targets such as the "three 20s" for 2020 (20% less greenhouse gases, 20% more energy efficiency, 20% more renewable energy), waste reduction (7% less per capita over five years) or energy efficiency in the building industry (38% less consumption in 2020 for existing buildings).

The second piece of legislation (the Grenelle II Act) was adopted on July 12, 2010 and its purpose is to implement Grenelle I. It was therefore more difficult to push through and is a hard read with 250 articles amending 34 Codes; it occasionally sets out major new obligations for public authorities, citizens and corporate bodies; as is usual in the French legislative process, implementation regulations adopted by Government decision are required for many of its provisions to become effective.

This presentation focuses on the impact of these legislative efforts from a corporate viewpoint.

Piercing a hole the Corporate Veil – How extensive?

In his Grenelle de l'environnement closing speech on October 25, 2007, the French President hinted at a major change in corporate governance: "it is unacceptable for a parent company not to be held liable for the damage its subsidiaries cause to the environment. It is unacceptable that the principle of limited liability becomes a pretext for unlimited irresponsibility. When you control a subsidiary, you must feel responsible for any ecological disasters it might cause (…)". Although the President's intentions were commendable, this speech brought into question the legal autonomy of a corporate entity, generally referred to as its "corporate veil", which continues to apply in complex corporate groups. As a result, when a company's legal form restricts the liability of its shareholders to the amount of their investment in that company – as this is the case for most stock corporations (SA, SAS or SCA but in the latter case only for shareholders) –, it is a very basic principle of company law that bankruptcy proceedings filed against a subsidiary structured as a stock corporation do not concern the parent company (except in very limited situations such as negligent management, comingling of parent and subsidiary assets and liabilities, or fictitious companies).

The Grenelle II Act purports to pierce a hole in the corporate veil : when a subsidiary operating a regulated facility for the purpose of environmental protection (in other words, a polluting and regulated activity) is placed into judicial liquidation and when it has insufficient assets as a result of the parent company behaviour, the receiver in charge of the liquidation, the public prosecutor or the préfet are entitled to take action before the Commercial Court to establish the existence of a "characterised wrong" (in French, faute caractérisée) by the parent company or even the ultimate holding company of the corporate group in order to have it held liable for all or part of the clean-up costs incurred for shutting down the site.

Parliament dismissed amendments which aimed to extend this "hole" to other types of environmental liabilities, for example in the water management or waste sectors, or to cases other than judicial liquidation, such as the subsidiary's voluntary winding-up. Parliament was ready to go much further, but the Government apparently felt that this would have entailed a serious risk of distorting competition to the detriment of industrial companies based in France. The Grenelle I Act had taken this into consideration when it stated that "France shall propose the introduction, at EU level, of the principle whereby parent companies can be held liable for their subsidiaries in the event of serious damage to the environment, and it shall support this initiative at international level."

For the time being, the provisions are presented as a way to prevent orphaned polluted sites, as was seen in the "Metaleurop" case. However, it is uncertain that these provisions will have the desired impact. Indeed, in order to hold a parent company liable, evidence of the existence of its "characterised wrong" must be brought. Yet this concept, which only concerns "the most serious offences" according to the Government in the parliamentary debates, might prove quite

restrictive. Further difficulties in interpretation are thus raised whereas the pre-existing and more general mechanism based on a claim of management errors committed by de facto or de jure managers of the insolvent entity would only require showing the existence of a management error committed by the manager(s), which could be a parent company.

The best way to resolve the problem of orphan sites in a corporate group situation would seem to be to opt, more radically, for the strict liability of the parent company. However, such a major reform would obviously have negative consequences at a time when France, an old industrial country, is trying to preserve its remaining manufacturing industries.

Voluntary Action for Environmental Responsibility

Regarding environmental liabilities other than those arising out of the operation of a classified facility, it is on a voluntary basis that the lead company of a corporate group can now undertake to bear a subsidiary's obligations to prevent and/or repair serious harm to the environment "in the event of the subsidiary's default. This new provision, which reflects the current context where companies are affirming their "corporate responsibility", may be appropriate for a corporate group wishing to affirm its strong commitment to defend the environment. The support that the Act provides to companies wishing to make strong environmental commitments may prove useful but only to the extent that taking over another company's obligations may be considered, in France, as contrary to its corporate interests, and thus open the risk for the executives of that corporate entity to be criminally sued for misuse of corporate assets.

New Environmental Reporting Obligations

The second aspect of the newly-adopted Grenelle II corporate governance steps involves the material extension of environmental reporting obligations. In 2001, the so-called "NRE" Act (NRE stands for "New Economic Regulations") had opened the way but was applicable only to listed companies. Following the expected publication of implementation regulations, major corporate entities in terms of size or economic sector (e.g., financial institutions) and their subsidiaries will be required to issue a yearly "social and environmental report" with their annual report. In the same vein, the Act requires companies with over 500 employees to draw up a report on greenhouse gas emissions every three years, beginning at the end of 2012; open-end investment funds and fund managers must also detail, in their annual report and in documents intended to inform their shareholders or investors, the social and environmental criteria governing their investments7.

Fluctuating between hard and soft law, the Grenelle de l'environnement process will therefore have a modest impact on internal corporate management (and wisely so in the "open" world which France lives in today).

The new business prospects in the green economy represent a more positive note for business, as the Grenelle process lays down targets and high-potential levers, particularly in the construction, energy, transport and waste management and processing sectors. According to a recent study from the French Treasury, the Grenelle de l'environnement targets should, by 2014, generate total additional investments of EUR 450 billion (equally supported by households, companies and the State) and create 200 to 250.000 green jobs.

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