



SUPPLY CHAIN AND LIABILITY

Legal tools for parent company's accountability

WORKING DOCUMENT

November 2007

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ABSTRACT

This working document is the logical extension of the previous one, which attempted to redefine the liability regime for a group of companies.¹ After having examined the issue of seeking ways to make parent companies liable for the actions of their subsidiaries, the present document now examines the relationships that exist between a company and its commercial partners who are involved in the supply chain.²

The development which follows therefore aims to establish legally relevant criteria which will make it possible to oblige parent companies to **prevent** and **repair** damage perpetrated by partners who are involved in the supply chain (other entities in the group, suppliers, sub-contractors, agents, etc). Clearly, this can only be envisaged if it can be proven that the company could have contributed to these being avoided if it had fully exercised its influence.

The approach taken in this working document is as follows:

- firstly, **identification of the major legal problems** relating to the supply chain environment (1);
- secondly, **identification of useful legal concepts** which will enable direct liability of parent companies with respect to a supply chain to be apprehended (2);
- thirdly, **test of the proposals** with concrete cases (3).

¹ Cf our developments in the paper *Redefining corporation – How new EU Corporate Liability Rules could help?*, section 1.2.2.2 [September 2007].

² Version 3 of the Guidance provided in the "Global Reporting Initiative" (GRI) which suggests standardisation of the content of sustainable development reports published by companies, defines the limits of accountability for corporate social responsibility as follows: "...The limits of any sustainable development report should extend to include all entities with existing or potential measurable impacts on sustainability and/or over which the organisation exercises significant control or influence in terms of policies and financial and operational practices." (GRI 3, 2006, p.14) [in *Contrôle et RSE aux frontières de l'entreprise: la gestion responsable de la relation fournisseurs dans les grands groupes industriels*, p.4 - <http://www.iae.univ-poitiers.fr/afc07/Programme/PDF/p202.pdf>].

1. IDENTIFICATION OF THE MAJOR LEGAL PROBLEMS RELATING TO THE SUPPLY CHAIN

Among others definition of the notion of supply chain we can retain is "a set of three or more entities (organizations or individuals) directly involved in the upstream and downstream flows of products, services, finances, and/or information from a source to a customer."³

Catching parent company liability through its supply chain generates obstacles linked to the notion of "**corporate veil**" and the need of **transparency** within complex supply chains.

Corporate veil - The paper will study already existing legal tools which enable the veil to be lifted on incorporation and thus make a parent company accountable.

Among others, competition law and bankruptcy law aim to ensure fair competition and the protection of the interests of adversely affected partners and third parties. We believe that interests affected by the negative externalities of multinational corporations in the course of their supply chain also fulfil these conditions. On the one hand, the aim is to ensure fair competition between companies (particularly those who have expressed ethical commitments), while on the other hand the aim is the prevention and reparation of social and environmental damages.

While we deem these objectives to be similar, they both apply to the extremely complex environment of the supply chain, which must be circumscribed in law.

Transparency within supply chain –

Through the study of existing mechanisms (in matter of food safety, wood and diamond industries) the paper argues that the existence of several traceability and labelling procedures demonstrates that it is perfectly possible for the parent company to be fully aware of the supply chain, regardless of how long it is.

³ Journal of Business Logistics, Vol.22, No.2, 2001, *Defining Supply Chain Management* by John T. Mentzer The University of Tennessee, William DeWitt The University of Maryland, James S. Keebler St. Cloud State University, Soonhong Min Georgia Southern University, Nancy W. Nix Texas Christian University, Carlo D. Smith The University of San Diego and Zach G. Zacharia Texas Christian University.

While the perimeter of the obligation of transparency and the related liability rules differ depending on the procedures used, the obligation of transparency itself is vital because, when correctly applied, it demonstrates the following:

- **the existence of a direct influence of operators on their supply chain;**⁴
- **recognition that operators are subject to obligations of precaution and prevention.**

By extension, we consider that the safeguarding of the interests of third parties who have been victims of violation of environmental and/or human rights should legitimately benefit from such transparency measures.

The above points demonstrate that any attempt to improve the rules of the game will involve responding to the two following issues:

- 1. the need to overcome the legal obstacles relating to the legal autonomy² of supply chain stakeholders** ⇒ we believe that setting up a genuinely binding social and environmental reporting obligation for which the parent company is liable would remedy this problem. It would 1) ensure that the parent company's home country courts have jurisdiction and 2) oblige the company to prevent and repair damage generated throughout the supply chain.
- 2. On what legal basis can the liability of parent companies be sought with respect to a supply chain?** While the points above make the case for imposing greater transparency on the part of current companies with respect to their supply chain, ways of actually making it liable must

⁴ This cause-and-effect relationship between a certification procedure and the influence exercised by the expediting company over the companies that fall within the scope of such procedures is also recognized by some OECD National Contact Points, as Cornelia Heydenreich points out: "Some National Contact Points emphasise, especially Chapter 10 of the explanatory notes of the Guidelines, which directly concerns supplier's relations. The representatives emphasise potential realisation of 'direct influence' rather than of investments. Though direct investments may result in increased control and may imply direct influence, **direct influence can also result from the other circumstances: from market power or other corporate practices such as certification or systems that allow detailed tracking of a product following the supplier chain.** (...) There are also other corporate practices to exert control over companies: This is the case, if the supplier is made responsible for specific performances such as compliance with quality standards." [in *Where is the Limit to Corporate Responsibility? Trade Relations and Supply Chain Responsibility of Multinational Enterprises* - Germanwatch, 2004, pages 23ff].

also be identified. This is the aim of section 2, which aims to identify rules enabling both external commercial partners and third-party victims to launch direct proceedings against the parent company.

2. IDENTIFICATION OF USEFUL LEGAL CONCEPTS

The paper will use the distinction between primary and secondary obligations.

PRIMARY OBLIGATIONS

We have distinguished two categories of primary obligations:

1. Conventional obligations

Over and above the debate relating to the direct application to companies of certain international norms protecting fundamental rights (PIDCP, PIDESC, OECD Guidelines) it is commonly acknowledged that companies must respect the ECHR and certain ILO conventions or face direct legal action on the part of victims.

2. Contractual obligations

The EU could impose measures similar to those which exist in French law governing construction and public works:

- requiring subsidiaries and their first-line external partners to have all external partners approved by the parent company and inform the latter of the agreed contractual terms and conditions;
- imposing an obligation of oversight on parent companies requiring them to ensure that their subsidiaries and first-line external partners have properly complied with their obligations of information to the former.

We hold that measures of this kind have the merit of clarifying the limits of obligation of social and environmental reporting and extending these to governing the supply chain perimeter.

SECONDARY OBLIGATIONS

We have thus identified two fundamental secondary obligations relating to the **abuse of rights** and **unilateral commitment**, which could be applied in several ways at the level of the European Union such that victims could take direct legal action against parent companies:

1. Precaution and Prevention

The importance of an obligation of information and the effects generated by the proposed reinforced obligation of reporting must be borne in mind in this respect. Such an obligation to report risks and the occurrence of damage in environmental and social terms should encourage parent companies to take all necessary means to prevent these. The issue for companies will be to anticipate any abuse of rights and/or violation of their unilateral commitment.

2. Reparation - 4 levels of proceedings

Proceedings by competitors - We suggest that a new anti-competitive practice should be incorporated into competition law, defined as *acting contrary to commitments expressed in individual and/or corporate codes of conduct*.

Proceedings by external partners (sub-contractors / Suppliers) - the combination of the notions of abuse of rights and unilateral commitment opens up avenues of civil liability proceedings against parent companies on the part of *external partners* who have been the victims of contractual conditions which do not enable them to fulfil their commitments, specifically to fulfil parent companies' own ethical commitments by which they are usually contractually bound. Proceedings of this type would be possible for the purposes of a recursory action if the sub-contractor has been held liable and been required to compensate for damages relating to the violation of a primary obligation. This would encourage multinational corporations to ensure that the terms of contract throughout their supply chains complied with the motion of a **sustainable contract**. Following this reasoning, it is quite conceivable that **employee representatives** from sub-contracting companies could launch such proceedings against the parent company of the prime contracting group.

Proceedings by third party victims - the benefits of an obligation of reporting combined with the civil and criminal liability regime put forward in the previous working document should be borne in mind in this respect. This would enable civil or criminal liability proceedings to be initiated by victims against the parent company, with equitable arrangements as regards the burden of proof. In this respect, victims would fulfil the commonly accepted definition of *stakeholders*.

Consumer proceedings - in addition, application of the EU Directive n°2005/29/CE concerning unfair business-to-consumer commercial practices in the internal market⁵ will complement the proposed scheme. Indeed this latter provides in its article 6.2.b that *non-compliance by the trader with commitments contained in codes of conduct by which the trader has undertaken to be bound* is qualified as a misleading commercial practice. This ability for consumer associations to initiate proceedings of this nature should have a significant impact, encouraging companies to adjust their practices throughout their supply chain.

The paper will also present various:

- **rules of interpretation** (good faith, constructive knowledge, legitimate expectations, *gestion en bon père de famille*, etc.). The use of these rules would namely avoid the current discretionary interpretation of CSR standards by multinational companies.
- **routes for dispute anticipation** (role of SRI, rating agencies, statutory auditors, financial market authorities) and **resolution** (referring namely to the role of OECD National Contact Points).

⁵ Dated 11 May 2005 - <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:149:0022:0039:EN:PDF>.

Note - All studies⁶ relating to procedures for controlling supply chains in all sectors of business, conclude that there is no legally efficient system guaranteeing the application of national and international standards. This document aims to suggest ways of filling this gap.

⁶ Several initiatives have been taken in the toy-making, electronics and shoe manufacturing industries with respect to the sub-contracting chain, including the following: Electronic Industry Code of Conduct (EICC), Ethical Trade Initiative (ETI) - *footwear and apparel elements*, Fair Labor Association (FLA), International Council of Toy Industries (ICTI), Social Accountability International Standard and Verification System (SA 8000), Worldwide Responsible Apparel Production (WRAP) *Meaningful change – Raising the Bar in Supply Chain Workplace Standards*, November 2006 drawn up by John Ruggie http://www.ksg.harvard.edu/mrcbg/CSRI/publications/workingpaper_2_9_casey.pdf. See also Richard Locke, Thomas Kochan, Monica Romis and Fei Qin, *Au-delà des code de conduite: l'organisation et les normes du travail chez les fournisseurs de Nike*, *Revue Internationale du Travail*, vol. 146 (2007), n°1-2, ILO.

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The development which follows therefore aims to establish legally relevant criteria which will make it possible to oblige parent companies to **prevent** and **repair** damage perpetrated by partners who are involved in the supply chain (other entities in the group, suppliers, subcontractors, agents, etc). Clearly, this can only be envisaged if it can be proven that the company could have contributed to these being avoided if it had fully exercised its influence.

At this point, it is worthwhile asking whether it is legitimate, and even fair, to attempt to establish liability on the part of the parent company. We assert that this is the case. First and foremost because today, multinational corporations think and act globally and their business is organised around a large number of constituent entities. Paradoxically, this widespread *modus operandi* results in the group's structures being more remote and autonomous on the one hand⁸ and on the other hand, in globalisation of purchasing, marketing campaigns, profits and ethical commitments which are expressed at the level of the group as a whole. Thus, even where there is a trend to have increasingly autonomous subsidiaries, the parent company exercises major influence over operations and receives the fruits of these (by means of both dividends and the practices of management fees and transfer pricing).

⁷ Version 3 of the Guidance provided in the "Global Reporting Initiative" (GRI) which suggests standardisation of the content of sustainable development reports published by companies, defines the limits of accountability for corporate social responsibility as follows: "...The limits of any sustainable development report should extend to include all entities with existing or potential measurable impacts on sustainability and/or over which the organisation exercises significant control or influence in terms of policies and financial and operational practices." (GRI 3, 2006, p.14) [in *Contrôle et RSE aux frontières de l'entreprise: la gestion responsable de la relation fournisseurs dans les grands groupes industriels*, p.4 - <http://www.iae.univ-poitiers.fr/afc07/Programme/PDF/p202.pdf>].

⁸ This approach involves control by the network company which has emerged as the result of this new form of organisation of production. "Network companies are decentralised organisations, made up of relatively autonomous production and/or decision centres" (Mariotti, 2005, p.21) [in *Contrôle et RSE aux frontières de l'entreprise: la gestion responsable de la relation fournisseurs dans les grands groupes industriels*, p.13 - <http://www.iae.univ-poitiers.fr/afc07/Programme/PDF/p202.pdf>].

Having established this, the next stage is to seek legal solutions. This is one of the major difficulties in this exercise. The issue is to identify foundations in law which could be used as grounds for an external partner (**contracting party**) regardless of their status, or a **third-party** victim, making a claim for damages from the parent company, given that the former only has relationships with a subsidiary of the group (a first-line partner) or with another partner outside the group (a second-line partner or less), while the latter (third party) has no direct relationship, with the notable exception of codes of conduct of which they are generally the recipients.

This problem brings the notion of "sphere of influence" into the picture - an essential concept which is devoid of legal definition. It can be noted that it features in article 1 of the standards adopted on August 13, 2003 by the UN Social and Economic Council⁹ as well as in the mandate of Professor John Ruggie, who was appointed in 2005 as the UN's special representative for human rights and business - transnationals and other enterprises.¹⁰

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Determining these criteria clearly requires a pragmatic perspective on the current organisation of globalised trade. The difficulties reside in the increasingly complex nature of corporate structures and contractual frameworks. What is more, market-driven logic creates obstacles in that it does not favour

⁹ [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.Sub.2.2.003.12.Rev.2.En](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2.003.12.Rev.2.En).

¹⁰ Point (c) of Resolution 2005/69: "To research and clarify the implications for transnational corporations and other business enterprises of concepts such as 'complicity' and 'sphere of influence'". [<http://daccessdds.un.org/doc/UNDOC/GEN/G06/110/28/PDF/G0611028.pdf?OpenElement>].

long-term contractual relationship-building,¹¹ and generates cultural obstacles.¹²

Lastly, consumer attitudes form an integral part of the problem, as is demonstrated by the 4:40 effect, which describes how so-called "green" products are attempting to capture between 1 and 4 percent of market shares. This ratio has been established on the basis of the observation that while some 40% of adults are convinced that it is worthwhile consuming these products, only some 4% actually do so.¹³ It may be assumed that this attitude on the part of consumers is partly the result of there being no clear rules enabling them to distinguish virtuous companies from the rest.

To date, this state of affairs prevents companies that are genuinely committed to a socially responsible approach from obtaining a legitimately expected competitive advantage. Thus establishing clearer, stricter rules would be a means of providing better **legal security** and restoring **conditions of fair competition** and enabling companies to achieve what is commonly known as the "**triple bottom line**": i.e. incorporation of the three objectives generally assigned to sustainable development - economic prosperity, social justice and

environmental quality¹⁴ - into the company's own objectives.

Note - All studies¹⁵ relating to procedures for controlling supply chains in all sectors of business, conclude that there is no legally efficient system guaranteeing the application of national and international standards. This document aims to suggest ways of filling this gap.

1 LEGAL PROBLEMS ARISING FROM THE SUPPLY CHAIN

Constraints arising from the absence of precise definitions

In general, the notion of supply chain is defined as being "the global network used to supply products and services from raw materials to final customers by means of a rationalised flow of information, physical distribution and money"¹⁶. Others define it as "a set of three or more entities (organizations or individuals) directly involved in the upstream and downstream flows of products, services, finances, and/or information from a source to a customer."¹⁷

This definition makes reference to the notion of a network of companies. It includes both companies organised as part of an integrated group (a group of companies, 1.2) and companies outside such a group (referred to hereinafter as "*commercial partners*") which the

¹¹ Generally speaking, the supplier will concentrate on the most severe constraint (Abernethy and Chua, 1996); if controls in terms of CSR are not very binding, compliance becomes purely a matter of form (Auberger *et al.*, 2005). This market-driven logic also involves competition between, and frequent changes of suppliers; if these relationships are only short-term, it becomes impossible to build in long-term training in CSR for suppliers. In other words, when inter-organisational economic control is driven by the market alone, there is only token implementation of CSR; if the supplier family is liable to generate significant risks in terms of reputation, this control will become bureaucratic, with only token influence and minimal compliance of the supplier, involving no significant improvement in their practices. [in *Contrôle et RSE aux frontières de l'entreprise: la gestion responsable de la relation fournisseurs dans les grands groupes industriels*, p.16 - <http://www.iae.univ-poitiers.fr/afc07/Programme/PDF/p202.pdf>].

¹² Inter-organisational control is implemented first and foremost by operational stakeholders: purchasers and managers of business units. The incentive systems for such purchasers and their culture are far removed from sustainable development and CSR. Their training and core business are based on the culture of technical and economic efficiency; for many of them, environmental criteria and above all social criteria, other than as enshrined in law, do not form part of the "normal" requirements in terms of supply. The notion of full cost does not feature in their decision-making. They do not wish to intervene in their suppliers' business by increasing their demands and controls - which are already extensive - and thus make negotiations even more difficult. What is more, their incentive system is based on the economic criteria of profit margins, so the last thing they want is to agree to a price increase in return for better quality in terms of CSR. In a survey of purchasing managers of 38 major French companies by O.Bruel and O.Menuet, (2006), only 10% of the companies interviewed carried out assessments of individual and corporate performance which incorporated the issue of sustainable development. In the pro-active companies that we have encountered, there had been a start on awareness training of purchasers, but the incentive and assessment systems for purchasers were still based on economic criteria (profit margin, quality, lead times). [in *Contrôle et RSE aux frontières de l'entreprise: la gestion responsable de la relation fournisseurs dans les grands groupes industriels*, p.17 - <http://www.iae.univ-poitiers.fr/afc07/Programme/PDF/p202.pdf>].

¹³ Ashok Ranchhod and Călin Gurău *Marketing Strategies - a contemporary approach*, p. 113, 2007, Prentice Hall Financial Times.

¹⁴ Introducing social and environmental criteria into management control of supplier relations would propel CSR right to the heart of economic activity; it is hardly surprising that profit-based objectives dominate and that there is such significant resistance as soon as a conflict emerges within the "triple bottom line" objectives. [in *Contrôle et RSE aux frontières de l'entreprise: la gestion responsable de la relation fournisseurs dans les grands groupes industriels*, p.17 - <http://www.iae.univ-poitiers.fr/afc07/Programme/PDF/p202.pdf>].

¹⁵ Several initiatives have been taken in the toy-making, electronics and shoe manufacturing industries with respect to the sub-contracting chain, including the following: Electronic Industry Code of Conduct (EICC), Ethical Trade Initiative (ETI) - *footwear and apparel elements*, Fair Labor Association (FLA), International Council of Toy Industries (ICTI), Social Accountability International Standard and Verification System (SA 8000), Worldwide Responsible Apparel Production (WRAP) *Meaningful change - Raising the Bar in Supply Chain Workplace Standards*, November 2006 drawn up by John Ruggie http://www.ksg.harvard.edu/mrcbg/CSR/publications/workingpaper_2_9_casey.pdf, Richard Locke, Thomas Kochan, Monica Romis and Fei Qin, *Au-delà des code de conduite: l'organisation et les normes du travail chez les fournisseurs de Nike*, Revue Internationale du Travail, vol. 146 (2007), n°1-2, ILO.

¹⁶ American Production and Inventory Control Society (APICS) Dictionary

¹⁷ Journal of Business Logistics, Vol.22, No.2,2001, DEFINING SUPPLY CHAIN MANAGEMENT by John T. Mentzer The University of Tennessee, William DeWitt The University of Maryland, James S. Keebler St. Cloud State University, Soonhong Min Georgia Southern University, Nancy W. Nix Texas Christian University, Carlo D. Smith The University of San Diego and Zach G. Zacharia Texas Christian University.

former calls on to supply products and services or to subcontract work and services (1.3). Any attempt to improve the rules of responsibility within the supply chain must begin with an examination of these two components. Their perimeters must be defined and obstacles and means of overcoming the latter must be identified. But prior to this, it is vital to identify the constraints arising from the legal autonomy of the players in a supply chain (1.1).

1.1 Obstacles arising from the legal autonomy of players in a supply chain

1.1.1 Problems relating to competency and applicable law¹⁸

Most cases which involve multinational corporations pose a problem in terms of jurisdictional competency (which jurisdiction or forum is competent to rule on the matter?).¹⁹ When damages have occurred abroad but one of the companies is located in France, for example, French rule of law does not automatically apply. The court first has to consider whether it is competent to rule on this dispute in the light of international, European and French law and then verify which law will be applicable.

In the present example, the risk is that French law may turn out to be completely ineffective against groups of companies. This is because if the law does not provide any means of establishing presumption of liability on the part of the parent company and does not specify that failure to respect this obligation of

reporting constitutes liability, the risk is that companies will invariably continue to escape liability in the event of damage because French law will not be applicable to the dispute, since the **proximate cause** for which liability is being sought occurred abroad.

If proceedings are brought before a French magistrate by a claimant who is not resident in France for damages which occurred abroad, the French judge may be competent under the terms of European competency rules.²⁰ In this case, the magistrate must decide which law to apply to the dispute. Depending on whether the new European regulation Rome II²¹ applies, or if by default French rules on conflicting law apply, magistrates may apply the law of the country in which the proximate cause of the damages is located. **If it is held that the parent company has not fulfilled its obligation of reporting and that this is at the origin of the damage because the parent company did nothing to avoid it, French law could apply in this case.**

¹⁸ We could also use the term "forum shopping" which is the informal name used by litigants; it refers to the choice plaintiffs have in international litigations to choose the country where the litigation will take place.

¹⁹ Thor Chemicals Holding Ltd/ Desmond Cowley case: Thor manufactured mercury-based chemicals in South Africa. In February 1992, several cases of poisoned workers were reported. 20 workers sued the parent company, based in England and its chairman Desmond Cowley, before the English High Court. The claimants alleged that the company had been negligent in its operation, supervision and monitoring as it had failed to protect the South African workers against the foreseeable risk of mercury poisoning. Thor raised the forum non conveniens defence, but the judge rejected its application and recognized the connection between the claim and England. In the RTZ case the main legal issue was again the forum one. A claim was brought by Mr. Connelly, a cancer victim employed at RTZ's Rossing uranium mine in Namibia, before the English Court. The defendant, RTZ, argued that England was not the appropriate forum. The claimant had therefore to prove why justice could not be done in the Namibian forum. The English judge stated that the appropriate forum was England as the claimant would not have been able to have access to the Namibian court because of lack of financial assistance there. Even though those two cases ruled in favour of the claimants, the existence of this doctrine does not provide sufficient predictability of outcome as the decision regarding jurisdiction is a matter of the judge's discretion.

²⁰ Art.5-3 of the Council Regulation I 44/2001 and subsequent legal precedent allows claimants in criminal liability cases to engage proceedings before a court in the country where the damage occurred or before a court in the country where the proximate cause of the damages was located. Thus if the proximate cause of the damages is the misconduct of the parent company in not supplying the report, the proximate cause is indeed in France and a French magistrate is competent. This is precisely the kind of circumstance for which the addition of the notion of "fault" to article L.225-102-1 of the Code of Commerce has been suggested.

²¹ Since July 11, 2007, the rule governing conflicting law for French magistrates in criminal cases is European regulation 864/2007 governing law applicable to "Rome II" non-contractual obligations. This regulation's rule of principle as set down in article 4-1 is the **law applicable to the place the damage took place, independently of the law applicable in the location of the proximate cause**. This solves the problem posed by complex offences. There are however some exceptions which slightly reduce the impact of this general rule. Particularly with respect to the **environment**, the plaintiff in a criminal liability case will still be able to **choose between the law in the place where damages occurred and the law applicable in the location of the proximate cause**. However, some doubt remains as to the scope of the relevant regulations. Article 2-d specifies that "non-contractual obligations arising from company law (...) including (...) personal liability of associates and bodies for debts incurred by companies (...) and corporate entities (...)" are excluded from the scope of the relevant regulations. Thus, given that the regulation applies to liability proceedings initiated against a company for violation of its obligation of reporting with ensuing damage, the applicable law under the regulation will be that of the place the damage occurred, which, for a group of companies, will most likely be abroad. The protection which French law is supposed to offer would thus cease to be effective. However, if this regulation does not apply, if proceedings are brought before a competent French magistrate, the latter must apply the French rule on conflicting law. While this is a matter of precedent and thus less clear, it allows the plaintiff to choose between the law applicable in the place the damage occurred and that applicable in the location of the proximate cause, in which case the burden of proof is on the defendant to demonstrate that the dispute is more closely related to the place the damage occurred. While allowing the plaintiff to choose between the law applicable in their location and that applicable in the defendant's location may not guarantee a satisfactory level of legal foreseeability, it does ensure that the plaintiff can benefit from the most favourable law in terms of liability, especially when the place the damage occurred is in a State where regulations governing company and liability law are virtually non-existent.

For further details, please refer to the previous working document.²²

1.1.2 Proposed solution

The need to overcome the legal obstacles relating to the rules of international private law - we believe that setting up a genuinely binding social and environmental reporting obligation for which the parent company is liable would remedy this problem. This would involve a two-stage response as set out in the previous paper:²³

- first and foremost, making the parent company accountable for its social and environmental impact across the group and declaring that any violation of this obligation constitutes misconduct for which it may be held liable by a third party;
- then devising a framework under which victims could hold the parent companies civilly and/or criminally liable, with suitable modes of administration of proof. The suggested framework of liability involves balancing the burden of proof between victims of damages and the parent company with a group-wide obligation of reporting.

An obligation of reporting is a valuable instrument in two ways:

- It acts as an **instrument to prevent and repair damages**, since the exercise of this obligation of reporting by the parent company involves it informing about and being informed of any risk and the occurrence of any incident in structures belonging to the group, and responding as appropriate in terms of prevention and reparation (cf our comment above).
- It also acts as a **legal instrument which gives competency to courts in the home country** to hear claims from victims located overseas. By making obligation of reporting mandatory, any violation by the parent company would constitute grounds for claims made for damages occurring overseas to any victim, including foreign victims, before courts in the company's home country. In assessing the degree of

liability of the parent company, the jurisdiction in which proceedings are initiated would consider whether any failure to comply with the obligation of reporting constituted a direct or indirect proximate cause of the damages.

Note: Clearly, any such procedure does not dispense with the victim from supplying proof of **damages, misconduct and causality (criteria for establishing a party's liability)**. However, the administration of proof incumbent on the victim would be facilitated²⁴ by expressly stating the wrongful nature of a breach in the obligation to inform with respect to social and environmental impacts, implicitly requiring parent companies to make every effort across their groups to **prevent risks and contribute to the reparation of any damages**. Two scenarios must therefore be envisaged:

- a. either the risk relating to their business **was not reported** by the company - which constitutes a breach of its obligation and thus a reckless or negligent act. In this scenario, in the event of a claim by a victim who can demonstrate the occurrence of damages relating to the business of a subsidiary or **subcontractor**,²⁵ the parent company must demonstrate what alternative measures it has taken. In this scenario, the victim simply needs to provide proof of the absence of adequate reporting.
- b. or the risk or occurrence of damages has been **reported but the parent company has done nothing to prevent and/or repair this** - in this scenario, failure of the parent company to act despite being aware of the circumstances constitutes misconduct and can thus be used as evidence against them.

In either scenario, the court before which the claim is brought must decide whether the parent company had done everything within its

²⁴ We accord priority to the interpretation which holds that "just as in the case where efficiency gains are used as the basis of a defence, the burden of proof for objective grounds rests with the dominant company" - this position also corresponds to the liability framework implemented in the draft 2007 directive on environmental responsibility with respect to exemptions. Cf Anne-Lyse Sibony and Eric Barbier de la Serre *Cherger de la preuve et théorie du contrôle en droit communautaire de la concurrence: pour un changement de perspective* - RTD Eur. 43 (2), Apr-June 2007, p. 222)

²⁵ In response to the question of the level of sub-contracting for which the parent company should control risks relating to its business and therefore take its share of liability in the event of damage caused by the subcontractor, cf the notion of economic dependency set out hereinafter, which provides a list of criteria which enable the real link between a parent company and its subcontractors to be established. Thus in their corporate reporting, parent companies should take into account all subcontractors which are economically dependent on them.

²² See Yann Queinnec *Redefining corporation – How new EU Corporate Liability Rules could help?*, section 1.2.1.1 [September 2007].

²³ Ibid.

power (commensurate with its sphere of influence) to prevent the damages which are the subject of the foreign victim's claim. They must then assess former's liability and determine any contributions to be made to prevention and/or reparation costs relating to the damages.

We believe that an **alleviation of the burden of proof incumbent on victims** of this nature would constitute a highly significant incentive for parent companies, which may be called upon to make reparation for damages caused by their subsidiaries, to do everything within their power to reduce their negative social and environmental impacts across their groups.

1.2 The notion of a group of companies

We will attempt to define the perimeter of a group of companies (1.2.1) and present resources enabling the veil to be lifted on incorporation (1.2.2).

1.2.1 Towards definition of the perimeter of a group

Parent companies are at the head of groups which include a large number of structures which operate at the first level of the supply chain. These companies are at the centre of transfer prices and management fees which deserve a study in their own right, given the considerable impact in the definition of a group.

Most often, it is these subsidiaries which are in direct contact with operators outside the group. They may even be a forum for exchanges between the parent company and the external operator 1. instructions received from the parent company, 2. order placed by the subsidiary to the subcontractor according to these instructions, 3. acceptance or, as a minimum, quality and/or quantity control of the external operator by the subsidiary, 4. Delivery of the product or service to the final consumer directly by the subsidiary or after transfer to another entity in the group, including the parent company, or via an external distribution network. In this respect, these "intermediary" subsidiaries are among the most significant entities within the group in terms of day-to-day operation of the supply chain. They are often the main point of contact for external partners in their capacity as co-contractors.

With the exception of German law, which provides a definition of a group of companies under the notion of *Konzern*, groups have no status in law, despite this clearly being an important perimeter to define. This by no means implies that no reference is made to groups, in fact the contrary is true; but their consideration in legal terms is only incidental, on the margins of broader measures or as part of jurisprudence, such that their legal status remains vague.

As in the previous working document on the subject of liability within a group, in the following developments, we will use the definition adopted by European accounting law. The Seventh Company Law Directive²⁶, by defining the scope of consolidation accounting, also defines the sphere of influence of the parent company and thus implicitly contributes to the introduction of the notion of a group into positive law.²⁷ This definition is as follows:

Article 1

1. Member states require any company governed by their national law to establish consolidated accounts and a consolidated management report if this company (parent company): a) holds the majority of shareholder voting rights in a company (subsidiary company),

or

b) has the right to nominate and/or remove the majority of the members of the administrative, management or supervisory body of a company (subsidiary company) of which it is also a shareholder,

or

c) has the right to exercise a dominant influence over a company (subsidiary company) of which it is a shareholder by virtue of a contract concluded with the latter or by virtue of a clause in the latter's by-laws, where the law governing this subsidiary company allows it to be subject to such contracts or statutory provisions; member States may choose not to stipulate that the parent company must be a shareholder of the subsidiary company. Member

²⁶ The Seventh Company Law Directive 83/349/EEC of 13 June 1983 based on Article 54 (3) (g) of the Treaty on consolidated accounts coordinates national laws governing consolidated (i.e. group) accounts. In Article 1, this Directive defines the circumstances in which consolidated accounts are to be drawn up. Any company (parent company) which legally controls another company (subsidiary company) is under a duty to prepare consolidated accounts. The scope of these consolidated accounts should be adopted regarding the reporting obligation (as derived from the Directive 2003/51/CE).

²⁷ Pierre Ramquet *Responsabilité de la société-mère du fait de sa filiale*, Milan seminar, 6-7 November 1998.

States whose law does not allow for this type of contract or statutory clause are not required to apply this provision,

or

d) is a shareholder of a company in which aa) the majority of the members of the administrative, management or supervisory body of this company (subsidiary company), in office during the financial year and the preceding financial year and until the consolidated accounts have been drawn up, have been appointed solely through the exercise of the parent company's voting rights

or

bb) it alone controls the majority of the shareholder voting rights by virtue of an agreement concluded with the other shareholders of this company (subsidiary company).

What is a parent company? - Once a group has been defined, the next step is to define a parent company. Should it be defined as the holder of "DNA" shares, the holder of the most important or strategic assets (such as the brand and patents), the holder of the financial structure through which consolidated profits flow back, the holder of the insurance structure or a holder of voting rights? Perhaps it is all these things. Defining a parent company merits a study in its own right and we do not feel equal to suggesting one which will meet with broad agreement. However, it can reasonably be supposed that the bodies making commitments and assuming related responsibilities across any given group do not exist in a vacuum. It is therefore conceivable that among all the structures that make up a group, those which should be held jointly liable for the consequences of failure to abide by commitments could be identified.

The Metaleurop affair, which aroused so much excitement in the French media in 2004, illustrates how it can be important in certain cases to associate the parent company with difficulties encountered by the subsidiary. As will be discussed hereinafter, the issue in this case was to draw the parent company into the enforced liquidation and bankruptcy proceedings so that it would bear the social and environmental consequences of the collapse of its subsidiary.²⁸ The magistrate used several instruments to lift the veil on incorporation for a group of companies. This clearly shows the

central, determining role of parent companies within a group of companies. As will be seen hereafter, regardless of the field, magistrates often need to have recourse to expedients to associate parent companies with their subsidiaries in the event of problems which could theoretically be seen as solely internal.

Today, such resources should be incorporated into a binding legal instrument enabling liability of parent companies to be extended in the event of damages caused by subsidiaries with respect to human rights and the environment.

1.2.2 Instruments to lift the veil of incorporation

The problem with groups of companies is the impenetrable nature of their structure. As we have seen, few national legislative bodies have expressly allowed for the notion of a group of companies. If the structure of the group is not properly understood, it is all the more difficult to engage the liability of the parent company. Firms are well aware of this; they have absolutely no interest in publicising details of their group's structures. Nonetheless, it is vital to understand the relationship between the parent company and its subsidiaries. Paradoxically, national magistrates in some fields of law are very quick to find legal means to lift the veil of incorporation, so perhaps it is time to provide some legislative reality for this all-too-real phenomenon, thereby aiding national magistrates by streamlining regulations relating to groups of companies.

The various existing methods for lifting the veil on incorporation derived from **bankruptcy law** and **competition law** will be discussed below. These methods are based on the generic notion of abuse of process. Abuse of process is a cardinal notion in Western law. It is used to prosecute any use of a law which goes beyond the bounds of reasonable use.

Defined during the 19th century through legal precedent, the theory of abuse of process derives from two major types of abuse: Social abuse and abuse with intent to harm. Social abuse is the perversion of the terms of the law to achieve an objective which is the opposite of that intended by the law. Abuse with intent to harm occurs when a law is used with the sole intention of harming another party.

Social abuse is a major avenue of legal change carried out by courts that use it to modify

²⁸ French *Cour de Cassation*, Commercial Chamber, 05-10.094, ruling on 19 April 2005 No. 866.

notions of law by reinterpreting the objectives of laws in the light of contemporary trends.

For instance, at the end of the 19th century, social abuse succeeded in creating the principle (previously *contra legem*) of compensation for the termination of an indefinite-term contract. At first, employees were compensated by defining some dismissals as abusive. Little by little, the law established criteria which eventually emerged through legal precedent.

Abuse of right is therefore both an instrument restricting the scope of laws which may benefit a legal entity, and a significant means of changing the law as applied by magistrates.

With respect to supply chains, abuse of right would involve **using the legal regime applicable in a foreign State** (which, by virtue of the principle of autonomy in contractual law, is not inappropriate in and of itself) **with the sole aim of avoiding one's obligations under the terms of the legal regime to which one is subject.**

The reader is also invited to consult our proposals in terms of reinforced obligation of reporting, which would also have the effect of directly requiring parent companies to inform others with respect to the social and environmental impact of their subsidiaries.²⁹

1.2.2.1 Applicable criteria in competition law

In European and French competition law, a group of companies is apprehended in economic terms in the event of the abuse of a dominant position and anti-competitive agreements.

First and foremost, a company is defined economically³⁰: this includes any entity carrying out economic activity. Furthermore, it is understood as being an autonomous entity,³¹ which is not equivalent to it having a distinct legal persona; in reality, this may designate all economic operators exercising a commercial activity and who are involved on a market, whether or not they are set up as a company, and who are autonomous enough to decide whether to commit themselves to and/or participate in the implementation of anti-competitive practices.

Legal precedent has developed on the basis of this particularity in competition law in an attempt to apprehend the liability of the entity within which such practices have been implemented, over and above simply referring to its legal structure.

For details of offences which are recognized by competition law in terms of **agreements, dominant position and abuse of economic dependency**, the reader is invited to consult the annexe (Table 2). These offences demonstrate the existence of effective legal methods which make it possible to overcome the obstacle of legal autonomy, particularly in order to establish liability on the part of parent companies.

Thus, some companies find themselves in a position of **economic dependency**, in which case the company in the dominant position should be capable of influencing actions on the part of the company it dominates.

The recent verdict delivered by the court of first instance in the Microsoft case is informative in this respect.³² In particular, this verdict ruled that by refusing to disclose information relating to interoperability to its competitors, Microsoft abused its dominant position on the market for PC operating systems. This case can be seen as a textbook demonstration of the means of intervention available to the European Union when a major interest is at stake. In this case, the issue was the restoration of proper competition and the court did not hesitate to restrict the exercise of intellectual property rights to achieve this.

1.2.2.2 Applicable criteria in bankruptcy law

With the exception of German law, which provides a definition of a group of companies under the notion of *Konzern*, no European country grants a legal identity to a group of companies.

In Belgium³³; each company retains its own individual identity and groups themselves are not subjects of law, so the English theory of "lifting the veil" cannot be applied. Permeability between companies is only recognised very occasionally.

²⁹ Cf section 1.1.2.

³⁰ ECJ, 23rd April 1991, Höffner, aff. C-641/90, Rec p 1979, att. 21.

³¹ ECJ, 12 July 1984, Hydrotherm, aff. 170/83, Rec. p 2999.

³² 17 September 2007, case T-201/04 of the first chamber of the CFIEC.

³³ Articles 35-6°, 123 and 147 ter of co-ordinated Laws relating to commercial companies? DATE

Jurisprudence has filled these gaps by **extending bankruptcy to the "manager" to correct an over-legalistic application of limited liability**. The courts have relied on two foundational concepts: **simulation** (fictitious company contracts, no *affectio societatis* ('spirit of cooperation') or **the abuse of corporate entities**. The precedent ruling in this respect is that of the Belgian *Cour de Cassation*, dated 1st June 1979, setting out the conditions under which this theory may be applied to individual managers³⁴. In addition to **confusion of assets** (shared bank accounts, no distinct accounting, payment of receivables owed by one party by the other), above all it must be proved that the conditions for bankruptcy status are fulfilled at the personal level for each "link" in the capitalist chain. The same reasoning is applied to groups. Thus exercising control over the other company is not sufficient proof: bankruptcy conditions must be fulfilled in the dominant company. By applying principles derived from civil liability, assimilating internal relationships between a manager and a corporate entity should in theory deprive third parties from claims against them (art. 1165 of the Belgian Code of Commerce). When failure to act can be established so as to constitute a failure to exercise a general obligation of due care, diligence and competence, an "Aquilian fault" may be established. From this, standards and norms of behaviour which are binding on all (competency or obligation of skill, good faith, loyalty, honesty with respect to third parties) have been derived in turn. Belgian doctrine has even gone so far as to establish this as an **obligation of vigilance and precaution**. The case used as an example is one in which a business is operated at a loss³⁵. Unfair competition may also be grounds for recognition of this nature.

French bankruptcy law has evolved the **theory of fictitiousness and appearance**. Jurisprudence is based on the fictitious nature

of a company, confusion of assets, and involvement of the parent company in contractual relationships of the dependent company, and thus on the **appearance of the situation created for third parties**. The *Cour de Cassation* has admitted a range of indicators, such as binding contracts agreed by another company whose company details are identical (same head office, same branch, same telephone number), a parent company coming between its subsidiary and the purchasers, or when the parent company directs all invoicing and delivery operations and the other companies act only as agencies. The confusion of assets must therefore be established. The overlap must be such that they are indistinguishable: assets and liabilities must have been intentionally confused through misappropriation of corporate assets or by the lack of distinct accounting, or by abnormal outflow of funds (with no compensation for the companies in question) between the related companies.

English bankruptcy law³⁶ has, however, developed the **theory of lifting the veil of incorporation**. The principle of the distinct persona of a company was established in the *Salomon vs Salomon case* in 1897, A.C. 22³⁷ but in some cases the veil of incorporation may be lifted, if there is clear confusion of assets, abusive domination, under-capitalisation, if one of the corporate entities is fictitious in nature, or if the various companies are economically integrated. This has been affirmed in fraud allegations: *Gildford motor company V Horne case* [1933] Ch. 935, where the defence of separation of assets was thrown out on the grounds that the company was created with the manifest intention of evading the law, its contractual obligations and acting prejudicially with respect to its creditors. **The theory of the implicit mandate**: *agency* may also constitute grounds for lifting the veil. The ruling in *Smith, Stone and Knight v. Birmingham* 1939, 4 All E.R. 116, developed tests which enable the existence of an implicit mandate between the

³⁴ Belgian *Cour de Cassation* 1st June 1979, docket ref.: 2502, legal basis: Article 442 of the Code of Commerce: "it cannot be legally concluded solely from a lack of distinction between the assets of any limited liability company which has been declared bankrupt and those of one of its managers that the manager is also in a state of bankruptcy. Bankruptcy of the latter may only be declared if it is proven that this manager is a trader who is in suspension of payments and whose credit is unsound (2)." <http://iure.juridat.just.fgov.be/?lang=fr>

³⁵ Mons Court of Appeal, May 20 1985: Basic management misconduct may engage Aquilian liability if it constitutes a violation of the general obligation of due care. "A careful and informed company administrator cannot disregard the potentially damaging consequences for creditors of pursuing a business for which there is no hope of recovery and where to persist in doing so will inevitably increase the losses sustained... if it appears that by any reasonable forecast, the company has virtually no hope of recovering from its difficulties, the board is guilty of misconduct by allowing the business to continue."

³⁶ Myfanwy Badge - *Transboundary Accountability for Transnational Corporations: Using Private Civil Claims*, working paper, March 2006.

³⁷ A corporate entity - a leather manufacturing company named Salomon Co. - was created and the company sold to this entity. To pay for this, Salomon took virtually all the shares, with the remainder going to his family, who comprised the board of the new corporation with him. To cover the remaining price of the sale, Salomon made a loan to the corporation, covered by a general lien on the corporation's overall assets. Several years later, the corporation ran into difficulties and liquidation proceedings were initiated. Salomon naturally lost the value of his shares but continued to operate the corporation to pay off his loan, taking the corporation's remaining assets ahead of the other creditors; a summary of the facts can be found at <http://www.er.uqam.ca/nobel/r22714/jur1031/8bh02.rtf>

entities to be identified using 5 criteria³⁸. There is one other criterion³⁹: examining whether the subsidiary has been created to assist the penetration of the parent company onto a foreign market or to forward its own interests. **In this case the subsidiary is instrumentalised by the company.**

LESSONS TO BE LEARNED

From the previous points, it can be seen that there are several procedures which could enable the veil to be lifted on incorporation and thus make a parent company accountable:

1) competition law

Instruments from the field of competition law are particularly appealing when considering the supply chain, in which the notions of abuse of the law and unilateral commitment may, in certain circumstances, constitute anti-competitive effects.

2) bankruptcy law

Since one of the main objectives in bankruptcy law is to safeguard the interests of partners and/or creditors of the company in difficulty, such law involves finding ways to hold the parent company accountable in this respect. By extension, we consider that the safeguarding of the interests of third parties who have been victims of violation of environmental and/or human rights should legitimately benefit from such measures.

Thus, in summary, competition law and bankruptcy law aim to ensure fair competition and the protection of the interests of adversely affected partners and third parties. We believe that interests affected by the negative externalities of multinational corporations in the course of their supply chain also fulfil these conditions. On the one hand, the aim is to ensure fair competition between stakeholders (particularly those who have expressed ethical commitments), while on the other hand the aim is the prevention

³⁸ Profits are treated as belonging to the holding company, administrators and officers are appointed by the holding company, the holding company is the directing level of the corporate entity, profits arise from the competence and action of the directors of the holding company or there is effective, constant control over the subsidiary.

³⁹ Insolvency Act, 1986, section 213 (fraudulent trading).

and reparation of social and environmental damage.

While we deem these objectives to be similar, they both apply to the extremely complex environment of the supply chain, which must be circumscribed in law.

1.3 The supply chain outside the group

1.3.1 Defining the perimeter of the supply chain outside the group

The supply chain designates *"the global network used to supply products and services from raw materials to final customers by means of a rationalised flow of information, physical distribution and money."*⁴⁰ This and the other definitions of the notion of supply chain demonstrate its centrality in business life. It could be said that it designates the circulation of value, from the design of a product or service to its delivery to the final consumer, whether the latter is a private individual or a firm. In short, the supply chain stops where consumption of the product or service begins.⁴¹

Once it has been situated in space and time, examining the supply chain's constituent parts in more detail reveals the pervasive presence of contracts. Contracts - whether digital, set down on paper or simply oral - are the stuff of which supply chains are made, organising a wide diversity of operations.

Closer analysis of the content of contracts is also required to fully grasp the parameters of the issue. Clearly, an exhaustive analysis of customary contractual terms is beyond the scope of this study. However, the principal components that are normally found in terms of contract may be identified:

- Terms of purchase/sub-contracting (including financial clauses, a liability clause, exclusivity clause, jurisdictional clause, compromissory clause, applicable law, etc): this is where ethical commitment clauses are usually to be found;

⁴⁰ American Production and Inventory Control Society (APICS) Dictionary

⁴¹ With, of course, the notable exception of after-sales service, another sector of business which is largely externalised.

- Transfer of rights of use for industrial property (patents, designs and patterns, brands, software, etc) => interoperability (the case of Microsoft)

In summary, **contracts can be seen as the supply chain's DNA.**⁴² This means that rules governing contracts will be a source of effective reform of the rules of liability applicable to the supply chain. Our aim here is therefore to identify components which are likely to enrich contract DNA in order to resolve the damage which may arise from their implementation. The second part of our study will therefore focus on contracts, examining ways of working back up the supply chain and calling the parent company to account.

Firstly, though, a discussion of certain measures will demonstrate that it is **technically possible to reveal the makeup of a supply chain - a vital prerequisite to establishing liability.**

1.3.2 Existing transparency measures

One of the difficulties raised by supply chains is the definition of their scope, the extent of which may vary widely. An order or project initiated by the principal company may only require the intervention of two or three subcontractors, or conversely involve dozens of subcontractors and brokers. Companies are the first to express the opinion that requiring the firm located at the top of the chain to manage and control⁴³ their subcontractors in such an apparently long chain is just too complicated, and they are not alone in this claim. Nonetheless, mechanisms have already been implemented in a variety of sectors of industry to deal with the problems raised by contract chains of this nature. The reader is referred to the annexes for a list of

⁴² It should also be noted that contracts are also at the origin of companies which may grow to become multinational corporations.

⁴³ "The aim of control is to reduce uncertainty and impose the power of the customer company. As Nogatchewsky (2004) points out, the more the subcontractor or supplier depends economically on the prime contractor (in terms of volume or type of business), the greater this influence will be; however, this economic dependency does not offer the same opportunities for control as is possible within an organisation. Management decisions are taken by the supplier; they run their company and would look unfavourably on attempts by their customer to interfere in its management. There is information asymmetry and there is a risk of opportunism (transactional approach). Moreover, the impossibility of obtaining information further down the supply chain than first-line suppliers is a strong argument in favour of limiting the extent of liability to this level. These characteristics structure theoretical transactional and relational approaches to inter-organisational control" [in *Contrôle et RSE aux frontières de l'entreprise: la gestion responsable de la relation fournisseurs dans les grands groupes industriels*, p.11 - <http://www.iae.univ-poitiers.fr/af07/Programme/PDF/p202.pdf>].

the main initiatives undertaken in the textile, shoe, electronics and toy industries.⁴⁴

We will focus on three of the best-known examples internationally, which relate to the timber and diamond industries and the food industry, which is particularly regulated in Europe.

1.3.2.1 Food safety and European law

Within the EC, measures have been implemented enabling permanent monitoring of certain contract chains.⁴⁵ The aim is to protect European consumers in terms of rights to health. Thus in the food industry, various instruments are used to regulate the contracts agreed throughout a food supply chain to ensure effective control of product origins. **These authorities' traceability procedures relate to every stage of the food supply chain.** To ensure this process is effective, a **liability regime has also been installed.**

This means that professionals involved in such chains have an **obligation of due care with respect to potential or proven risks.** The principles of precaution and prevention are thus fully deployed. Professionals are required to inform the relevant authorities if they believe that a foodstuff does not fulfil the conditions set out in the law; The regulation sees them as being "*the person best able to devise a safe food supply system*". These professionals therefore have an obligation to implement a **food safety management and assessment system applicable throughout the supply chain.** These EC measures have enabled highly efficient systems to be implemented throughout Europe.

These traceability procedures aim to provide information on where the product comes from, the changes and mixes it has undergone within a company and, lastly, who the next link in the food supply chain is.

⁴⁴ See also *Meaningful change – Raising the Bar in Supply Chain Workplace Standards*, November 2006 prepared for John Ruggie [http://www.ksg.harvard.edu/m-rcbg/CSRI/publications/workingpaper_29_casey.pdf]

⁴⁵ **Regulation 178/2002** came into force on January 1, 2005; this sets out a number of obligations for industry and distribution. Measures must be implemented to fulfil these obligations. So, for instance, industrial and distribution players must archive flow records for 5 years; be able to retrieve data within... four hours; provide immediate traceability of the preceding and following stages (the Authorities then reconstruct total traceability).

1.3.2.2 The timber industry

Over the last 25 years, **the timber industry** has progressed to the point where today there is a fairly effective labelling and traceability process. The situation is different to that of the food supply chain because **the processes implemented here are international rather than just European**; however, they are less stringent. An "FSC" certification label⁴⁶ may be granted following an audit by an independent inspection body. The most innovative of these is a **five-year certification of the traceability chain**, which over time has become indispensable for subcontractors and various other economic operators involved in the production chain leading to the finished product which consumers buy. **Inspections are carried out mostly with respect to "critical control points"**⁴⁷ at which certified timber could be mingled with non-certified wood. This label authenticates commitment and practices which the economic stakeholder is already implementing, allowing co-contractors and subcontractors to be sure that these standards are being complied with. Other mechanisms have also been implemented in this sector, such as the 1999 Plan for Endorsement Forest Certification (PEFC) and the ISO 14 001 standard, which requires compliance with laws in force in the country in which the company requesting certification is headquartered. The latter has been drafted by international standards organisations. The PEFC is only a commitment by the company to implement the standards involved in the procedure in the future.

These processes are not mandatory and require a desire on the part of companies themselves to opt in. This means it is up to the companies to implement adequate traceability systems. Nonetheless, the concept of certified wood remains a major asset in terms of marketing and many firms have chosen to opt in, although sadly they are mostly in northern countries. However, it should be noted that many NGOs have expressed reservations about the effectiveness of such mechanisms, arguing that they provide 'cheap' labelling without adequate guarantees.⁴⁸

⁴⁶ Forest Stewardship Council Certificate cf annex, Table 2.

⁴⁷ For more details, cf. table 2 in the annex.

⁴⁸ See in particular criticisms of the Forest Stewardship Council Certificate, <http://www.novethic.fr/novethic/site/article/index.jsp?id=101476>.

1.3.2.3 The diamond industry

The diamond industry and intervention by the international community. The Kimberley process was implemented following the war in Sierra Leone. The prime aim of this process was to stamp out what are known as "blood diamonds", since the conflict in question was closely linked to gaining control of diamond mines. Today, this process covers 71 States, some of which have even incorporated this international agreement into their domestic law. This agreement aims to control the whole logistics chain, from the mine right through to exports. Specific control points are implemented for small diamond producers, trading, cutting and polishing, etc. The chief difficulty resides in the trans-boundary nature of this business, with different stages taking place in different companies located in different States. Once the compliance of a consignment of diamonds with the relevant standards has been verified, they are issued with the Kimberley process certificate.

For their part, firms are required to implement an internal control system, designate an authority responsible for imports and exports, keep certain data, etc. This process is guided by the principle of self-regulation by each participant, sworn in by independent authorities, and by the principle of transparency, which is policed through an inspections process. The distinctive feature of this mechanism is the involvement of civil society, although companies also have to have a genuine desire to be involved for it to be fully effective. The vast majority of the firms concerned are now part of this mechanism due to fears of a negative public image if they do not join. However, to date, the absence of a desire to extend the Kimberley process to the ruby industry, in which Myanmar alone accounts for 90% of world production, can be observed.⁴⁹

Some countries have incorporated binding legislation relating to diamond producers who fail to comply with these requirements. Canada and the United States have set an example in this respect by incorporating the text of the scheme into their domestic law with related penalties of up to 10 years' imprisonment. The European Union has also adopted a regulation to control this procedure. Fuller details are available in an annex (Table 1).

⁴⁹ <http://www.leblogluxe.com/2007/11/vers-une-pnurie.html>.

LESSONS TO BE LEARNED

The preceding points argue that the existence of several traceability and labelling procedures demonstrate that it is perfectly possible for the main company to be fully aware of the supply chain, regardless of how long it is.

While the perimeter of the obligation of transparency and the related liability rules differ depending on the procedures used, the obligation of transparency itself is vital because, when correctly applied, it demonstrates the following:

- **the existence of a direct influence of operators on their supply chain;**⁵⁰
- **recognition that operators are subject to obligations of precaution and prevention.**

As with the lessons learned from examination of measures enabling the veil to be lifted on incorporation, the measures we have just discussed with respect to traceability are aimed at defending interests (food safety, biodiversity) which are deemed to be sufficiently important to legitimise further intervention by authorities.

By extension, we consider that the safeguarding of the interests of third parties who have been victims of violation of environmental and/or human rights should legitimately benefit from such transparency measures. Indeed, this is the aim of the Kimberley process which is designed to stamp out blood diamonds.

We believe that this state of affairs legitimises recourse to a reinforced obligation of transparency, as we have

⁵⁰ This cause-and-effect relationship between a certification procedure and the influence exercised by the expediting company over the companies that fall within the scope of such procedures is also recognized by some OECD National Contact Points, as Cornelia Heydenreich points out: "Some National Contact Points emphasise, especially Chapter 10 of the explanatory notes of the Guidelines, which directly concerns suppliers relations. The representatives emphasise potential realisation of 'direct influence' rather than of investments. Though direct investments may result in increased control and may imply direct influence, **direct influence can also result from the other circumstances: from market power or other corporate practices such as certification or systems that allow detailed tracking of a product following the supplier chain.** (...) There are also other corporate practices to exert control over companies: This is the case, if the supplier is made responsible for specific performances such as compliance with quality standards." [Where is the Limit to Corporate Responsibility? Trade Relations and Supply Chain Responsibility of Multinational Enterprises - Germanwatch, 2004, pages 23ff].

already recommended, the principles of which have been reviewed in section 1.1.2. The perimeter of this obligation should cover both levels of the supply chain, i.e. both inside and outside the group.

SUMMARY OF THE FIRST PART

The above points demonstrate that any attempt to improve the rules of the game will involve responding to the two following issues:

- 1. the need to overcome the legal obstacles relating to the legal autonomy of supply chain stakeholders**
⇒ we believe that setting up a genuinely binding social and environmental reporting obligation for which the parent company is liable would remedy this problem. It would 1) ensure the competency of the parent company's home country jurisdiction and 2) oblige the company to prevent and repair damage generated throughout the supply chain. The reader is referred to section 1.1.2 and, for further details, to the previous working document.⁵¹
- ⇒ **This leads to the related question of the perimeter and the contents of any such reinforced reporting obligation.** In terms of **content**, the reader is referred to work done by Garde⁵² for the ECCJ, bearing in mind that each company's situation is different and involves customised application to reflect economic realities. In terms of the **perimeter**, we believe that in addition to the commonly accepted distinction between an internal group perimeter and an external perimeter, **the reporting perimeter could be validly based on the notion of economic dependency** (in the broadest sense) as understood in accounting law and competition law.⁵³ This notion enables all

⁵¹ Cf our developments in the paper *Redefining corporation – How new EU Corporate Liability Rules could help?*, section 1.2.2.2 [September 2007].

⁵² Philip Gregor - *How can reporting become a relevant tool for corporate accountability at the European level?* [discussion paper for ECCJ, seminar held by Forum citoyen pour la responsabilité sociale des entreprises, octobre 2007].

⁵³ Dr. Michael Stephan refers to international standards, "concrete regulations on dependencies resulting from concentration on turnovers are provided by the International Rules on Accounting. Based on SFAS N°131n the US-American accounting addresses relationships based on dependency detached from investment relationships and requires companies to include related information if they earn at least ten per

the circumstances in which influence may be exercised by the dominant company to be incorporated. **Thus the existence of a certification procedure for partners outside a group, or the inclusion of terms of a group's code of conduct in the terms of contracts forming part of its supply chain, should lead to an obligation to report the social and environmental impact of these external partners.**

2. **On what legal basis can the liability of parent companies be sought with respect to a supply chain?** While the points above make the case for imposing greater transparency on the part of current companies with respect to their supply chain, ways of actually making it liable must also be identified. This is the aim of section 2, which aims to identify rules enabling both external commercial partners and third-party victims to institute direct proceedings against the parent company.

At this point in the study, it is important to set out the strategy underlying the proposals which follow.

Strategy

We believe that to make these measures efficient and hold the parent company properly accountable, two levels of direct proceedings should be provided for: those concerning external commercial partners on the one hand and those for third-party victims on the other. There are several reasons justifying such a strategy:

- Firstly, legal proceedings instituted by a victim in the host country leading to prosecution of the external partner would enable the latter to make a claim against the parent company of the group which requested its services where it is proven (under the terms of rules which we will attempt to define in the arguments set out hereafter) that it contributed to the damage in question occurring.
- Secondly, when issues with the judicial system in the host country prevent such a

claim being made, the victim (an external partner of the group, its employees or a third party) would be able to make a direct claim in the parent company's home country.

- Thirdly, the principles that will be set out hereinafter should enable commercial partners outside the host country to anticipate these risks. They would be able to argue that the terms of the contract that the parent company had concluded with a locally-based subsidiary did not enable it to guarantee the non-occurrence of damage of a social and/or environmental nature and that as a result, abiding by the ethical commitments transferred to them is unattainable and that these commitments are therefore abusive.⁵⁴

This would reduce the scope for parent companies to escape their liabilities.

2 IDENTIFICATION OF USEFUL LEGAL CONCEPTS

We have identified several legal resources which may provide answers to the questions raised above. We will examine these, distinguishing *primary obligations* (2.1) from *secondary obligations* (2.2),⁵⁵ i.e. differentiating standards which establish a specification or qualification on the one hand, and those that indicate how to recognize, produce or apply the first kind.

2.1 Primary obligations

The term "primary obligation" is used to define obligations that stipulate action or refrainment from action, in other words obligations to act

⁵⁴ This would address the following observation: "*The simplified approach of "outsourced responsibilities", but not "shared responsibilities" demonstrates how difficult it is for MNCs to ensure the application of CSR, especially when commercial interests enter into direct conflicts with the compliance with CSR*". [[Yun Gao "Secondary Effect" in implementation of CSR in Supply Chain in *Gouvernance, droit international et responsabilité sociétale des entreprises*, Organisation internationale du Travail, 2007, working document n°182, p.120 - <http://www.oit.org/public/french/bureau/inst/download/dp18207.pdf>.]

⁵⁵ This dichotomy results from Herbert Hart who made the distinction between "primary norms" and "secondary norms", i.e. between norms that establish a specification or qualification on the one hand, and those that indicate how to recognize, produce or apply the first kind. As Norberto Bobbio observes in this respect, "a legal order is a system which tends to maintain itself in dynamic equilibrium, using the second-degree rules to preserve or transform the first-degree rules" [*Nouvelles réflexions sur les normes primaires et secondaires, la règle de droit*, Bruylant, 1971, p. 104 - in *Dictionnaire de la culture juridique*, Denis Alland and Stéphanie Rials, PUF, 2003, p. 1342].

cent of their turnovers with a single customer" [*Responsibility of Multinational Enterprises within the Supply Chain – The theory of business Management's view of the 'investment Nexus' concept – in Where is the Limit to Corporate Responsibility? Trade Relations and Supply Chain Responsibility of Multinational Enterprises – Germanwatch, 2004, pages 34ff*].

and not to act. In what follows, we will attempt to identify these standards in the existing corpus to which players in a supply chain may be subject.

2.1.1 Primary obligations which are conventional in nature

Throughout trans-boundary supply chains, each party in the chain is subject to traditional rules relating to taxation, contracts, customs, etc. These rules may arise from international conventions or national legislation. None of these primary obligations relate closely to the issue of CSR, understood as a series of rules relating to be responsible behaviour of companies. If all the international conventions relating to human and environmental rights were directly applicable to multinational corporations, there would be no reason for such an extensive debate as to whether the standards included in CSR are voluntary or obligatory in nature. Two categories of primary contractual sources which may apply to firms can be identified:

- Primary obligations which are directly applicable to companies and which constitute grounds for individual parties to petition before their national courts. The main ones are the ECHR, some ILO conventions and part of the 1990 New York convention on the rights of the child.
- Primary obligations for which debate on their direct applicability is ongoing. The legal world is divided between two opposite theories. One holds that these conventions do not directly create obligations incumbent on firms, but that States are required to enforce them on companies through their domestic law. The other holds that companies are directly accountable to international bodies without the latter's conventions needing to be incorporated into domestic law. The dividing line between these two theories is whether multinational corporations are subjects of international law. If they are, which is our view, these conventions apply directly.⁵⁶ These obligations bring together most international instruments, particularly the OECD Guidelines with respect to

multinational corporations, the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights.

These primary obligations should form the general framework of rules for MNCs. In addition to these general rules, rules of a contractual nature could also be implemented within Europe to encourage companies within the Union to ensure their supply chains comply with these standards.

2.1.2 Primary obligations which are contractual in nature

2.1.2.1 Contractual clauses and the supply chain

Companies located within Europe are subject to a certain number of rules governing their relationships with other professionals also located in a State, regardless of whether the latter is a member of the European Union⁵⁷. As we have seen in the first part of this report, European institutions and member States have not hesitated to regulate logistics chains relating to food for enhanced consumer safety. Regulating logistics chains and thus contract chains is not simple, especially when the chain disappears into countries outside the Union. This is nonetheless necessary, because regardless of whether sub-contracting takes place inside or outside the EU, the finished product is destined for European consumers, and the EU embodies a certain number of values and guarantees a measure of protection of the rights of its "citizens". **This means that it has to require firms to control the supply chain and reduce the unfair effects of some standard contractual clauses.**

To date, there are two types of clause which are to be found mainly in sub-contracting contracts:

- clauses limiting the liability of the various parties, creating a cascade of liability which may eventually produce a *de facto* situation in which no one is liable.
- clauses which require subcontractors to abide by international regulations relating to corruption, human rights etc but without any sanctions for violations. Again, it is

⁵⁶ On the issue of whether multinational corporations are subjects of international law, cf the OECD Guidelines relating to multinational corporations: an evolving legal status. Available at <http://www.asso-sherpa.org/reflexions/SHERPA%20Etude%20Juridique%20OCDE%20V150607.pdf>, especially the postface.

⁵⁷ See, for example: with respect to steelworking, a 1963 decision by the High Authority of the ESCE which required companies to supply it with a certain amount of data on the external companies with which they intended to pass contract.

difficult in such cases both to establish who is really liable for the violation of such provisions and to take appropriate sanctions.

2.1.2.2 Proposed solution

French law provides an example of what could be imposed on European companies who use subcontractors.

In construction and public works contracts, which **involve many sub-contracting contracts**, the contracting authority, i.e. the main contracting party, and the contractor, i.e. the person responsible for carrying out the work, must abide by several obligations with respect to subcontractors⁵⁸.

- Contractors (the second link in the chain) have an obligation when concluding the contract **to ensure all subcontractors and terms of payment are accepted by the contracting authority** (first link in the chain). Contractors must also inform the contracting authority of all services which they intend to sub-contract and more particularly, which subcontractors they intend to use. Contractors must therefore assess their requirements and select the contractors to whom they intend to sub-contract services in advance; thus the contracting authority is aware of each detail in the chain. If the contractor needs to call on new subcontractors during the course of the contract, these must first be declared to the contracting authority.
- The contracting authority has an **obligation of oversight** since they are responsible for ensuring that the contractor and the latter's subcontractors have properly fulfilled their obligations of information to them; if not, they must serve them notice to do so. Thus the role of the contracting authority with respect to the contract chain is not simply passive: it **must control it**.

If certain rules of employment law are not abided by, the contracting authority and the contractor may be held jointly liable if, for instance, the contractor has illegally employed subcontractors.

This type of obligation can be found in contracts in some sectors, specifically the oil industry, but

depends on the willingness of the contracting parties to insert this type of clause. **By making this kind of obligation of oversight and information binding, companies located at the top of the logistics chain could be held liable in the event of such obligations not being complied with.** The process currently under way in the European Union in terms of contract law should make every effort to impose obligations of this nature on companies at the top of a chain of contracts and address the consequences of failure to control such chains. We recognize that chain management of this kind is not possible for any and every company, but many publicly listed firms could achieve this, given their size and the resources at their disposal.

2.2 Secondary obligations

Secondary obligations are designed to determine the consequences of violation of primary norms. They indicate the procedures for using primary obligations, how they should be complied with and how penalties should be applied for infringements.⁵⁹ The secondary obligations which we have identified in this section are thus resources which make it possible to require companies (parent companies in particular) to repair damage occurring anywhere in the logistics chain (independently of the liability of the company directly responsible for the damage) and encourage them to do everything within their power to avoid such damage.

2.2.1 Obligation of prevention

Here, we will do no more than recall our arguments concerning the preventive effects of a suggested **obligation of reporting** (cf 1.1.2) by means of which parent companies would be encouraged to do everything possible to prevent risks so as to avoid their liability coming into play.

It should also be recalled that we suggested making a general obligation part of European law. This could consist in requiring parent companies, managers and shareholders to do the following:

- Use their rights and obligations to exercise a positive influence over issues of general

⁵⁸ Law no. 75-1334 of 31 Dec. 1975, amended by the MURCEF Law no. 2001-1168 of 11 Dec 2001

⁵⁹ in *Dictionnaire de la culture juridique*, Denis Alland and Stéphanie Riels, PUF, 2003, p. 1342.

interest commensurate with their respective degrees of influence;

- Incorporate the notions of the *precautionary principle* and *sustainable development* into their decision-making processes and actions.

Imposing a general rule of conduct of this nature would have the advantage of encouraging jurisdictions before which disputes are brought to assess the facts in the light of this rule.

With respect to supply chain issues, these rules would enable jurisprudence to be established concerning the concept of a **sustainable contract**.⁶⁰ Further development of this subject is clearly outside the scope of this study, but it can already be noted that a contract requiring a subcontractor to abide by the prime contractor's ethical commitments without the financial terms agreed enabling the former to carry out the required investments would not fulfil the notion of a sustainable contract. Such a contract could also be defined in negative and rather absolute terms as being *any contract whose implementation does not lead directly or indirectly to a violation of the primary obligations set out heretofore*.

2.2.2 Obligation of reparation

There are two notions under which the liability of the company located at the top of the logistics chain can be engaged. The first is the notion of **abuse of rights**, and the second is that of **unilateral commitment**.

2.2.2.1 Abuse of rights

Abuse of rights is a notion which all known systems of law generally accept as being grounds for liability.⁶¹ *"The notion of abuse of*

⁶⁰This would constitute a response to the observation which holds that "while MNCs are promoting CSR on one hand, the delivery schedule and price given are more and more tight on the other hand. Unconvinced suppliers see MNCs as the beneficiary profiting from a vicious competition in developing countries" [Yun Gao "Secondary Effect" in *Implementation of CSR in Supply Chain in Gouvernance, droit international et responsabilité sociétale des entreprises*, Organisation internationale du Travail, 2007, working document no. 182, p.121 - <http://www.oit.org/public/french/bureau/inst/download/dp18207.pdf>.]

⁶¹The following States have adopted a general principle prosecuting abuse of process into their law: The Swiss Civil Code (art.2) sets out the principle that "manifest abuse of a law is not protected under law", German Civil Code [BtB], art.226: "The exercise of a law is not permitted when the only conceivable aim is to damage another party", Italian Civil Code, art.833 (applies to property law only), Austrian Civil Code, art.1295, cl. 2, Spanish Civil Code, art.7, formulated very broadly, Luxembourg Civil Code, art.6, cl. 1). Outside Europe, laws in other countries have similar provisions: Quebec Civil Code [1991], art.7: "no law may be exercised either with a view to harming another

rights prohibits conduct which may be permitted in and of itself but which is deemed to be prohibited in the final analysis."⁶²

As we have seen above, abuse of rights forms the basis of vital provisions in terms of competition law and bankruptcy law which make it possible to work back up to the parent company with a view to its prosecution. It is therefore legitimate to extend the use of this notion to the defence of other interests relating to the defence of the environment and human rights.

Again, as in section 2.1.1 relating to primary obligations of a contractual nature, it is worth recalling the terms of article 5 of the International Covenant on Economic Social and Cultural Rights, article 30 of the Universal Declaration of Human Rights, and 17 of the ECHR, which all use the same formulation to deal with the notion of the abuse of a right granted by one of these texts: "*Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.*"

However legitimate it may be, in some conditions which we will examine hereafter, the practice of identifying the most favourable legal conditions (in terms of labour, environmental or tax law for example) **may engage civil or criminal liability on the basis of the notion of abuse of process**.

It is now important to take a closer look at the legal nature of unilateral commitment, another concept which has been identified as a legal resource which is a sure and certain source of obligation and which may help in the establishment of a framework of liability suitable for the context of the supply chain.

2.2.2.2 Unilateral commitment

The unilateral contract emerged under ancient Roman law and has become one of the key

party or excessively and unreasonably such that it runs counter to the requirements of good faith"; Lebanon Civil Code: "any party exercising a right which causes damages to another party by exceeding the limits established by good faith or by the aim with which the right was conferred to them" is liable for reparation.

⁶² Laurent Eck, constitutional controversies and abuse of process.

components of obligation law; it is universally recognized by systems of law.⁶³

After describing the concept, we will discuss its interest in terms of apprehending the consequences of ethical charter violations.

2.2.2.2.1 Description of the concept

One definition of a unilateral commitment is *"the action by which a party demonstrates the intention of personal commitment by the sole expression of their will with a view to creating an obligation for which they are responsible"*.⁶⁴

European law has enshrined unilateral commitment of the will into the Principles of European contract law, article 2:107 of which states that *"A promise which is intended to be legally binding without acceptance is binding"*.⁶⁵ Any such promise may of course be revoked by the debtor.

The purely voluntary and unilateral source of the commitment rules out the need for acceptance on the part of the creditor; therein lies our interest for the purposes of establishing a link between the third-party victims and a company. This is because such promises generate rights for those to whom they are addressed, and the latter may avail themselves of these rights if the related commitments are not fulfilled.

The offence of false advertising is one of the methods already used to engage the liability of parties making such commitments.

The Supreme Court of California, in its May 2002 ruling on *Kasky vs Nike*, stated that failure to fulfil a commitment made in a code of conduct may be prosecuted on the grounds of fault advertising.⁶⁶ Mr. Mark Kasky based his

argument on the message conveyed to customers in the company's claims in terms of compliance with fundamental rights. The company maintained that it was ethically responsible in its contractual relationships.⁶⁷

2.2.2.2.2 Application to ethical commitments

Ethical charters set out commitments, and infringements have generated some encouraging debate.⁶⁸ However, several questions arise with respect to the criteria which codes of conduct must fulfil in order to qualify as unilateral commitments.

Contents

The content of such codes gives the appearance of relatively hard law,⁶⁹ often described as codes of conduct/ethics/ principle. They usually set out rules to which the company wishes to subject itself as a framework for its business, as illustrated by the following example:

Accenture code of business ethics: *"Accenture and all of its people will comply with all applicable laws throughout the world."*

These codes are generally designed to be subject to the broad rules of international law such as international conventions on human rights, rules relating to corruption and labour legislation; increasingly, codes of ethics also refer to care for the environment.⁷⁰

⁶³ François-Luc Simon *La spécificité du contrat unilatéral*, Revue trimestrielle de droit civil, April/June 2006, p. 209. See also Marie-Laure Izorche, 2000, *L'avènement de l'engagement unilatéral en droit privé contemporain*, Marseille, Presses Universitaires d'Aix-Marseille citée in André Sobczak *Les responsabilités sociales de l'entreprise – Menace ou opportunité pour le droit du travail?* - Relations Industrielles/Industrial Relations, 2004, Vol. 59, N°1, p.33.

⁶⁴ Amsatou Sos Sidibe in *Le secret médical aujourd'hui*, p.7 [http://www.afrology.com/soc/pdf/secrmedic.pdf]

⁶⁵ D. Mazeaud, La Commission Lando: le point de vue d'un juriste français, in *L'harmonisation du droit des contrats – Europe*, Economica, 2001, p. 141 et seq., esp. P. 152 [in François-Luc Simon *La spécificité du contrat unilatéral*, Revue trimestrielle de droit civil, April/June 2006, p. 233 and 234].

⁶⁶ *Kasky vs Nike* (2002), 27 Cal. 4th 939 (n°S087859, 2 May 2002). After being thrown out in the first instance, the plea was heard in 2002 by the Supreme Court of California. Nike then took the case to the Supreme Court, which declared itself incompetent in July 2003 and returned the case to be heard in a federal court. In an attempt to avoid a media outcry, the company decided to settle out of court by

committing to \$1.5 million worth of finance for auditing, educational and credit programmes through the *Fair Labor Association* NGO.

⁶⁷ The same concept can be found with Ikea, which makes the following express commitment in its catalogue: "All these suppliers apply Ikea's code of conduct which sets out the minimum requirements that my suppliers must abide by in terms of ethics, working conditions and care for the environment."

⁶⁸ A recent French publication bringing together the positions of experts in business law indicates some of the progress with respect to this issue. For instance, Benoît Le Bars says "to take this idea further, it is even possible to consider that if the company has chosen to enshrine corporate governance rules in a code of ethics or charter, violation of the principles set out by the charter itself could also have a binding effect in law. Thus violation of the governing body's charter could engage contractual liability for the shareholders. For third parties who are not contracting parties with respect to the company by-laws, violation of a principle set out in the charter could be put forward to establish that an offence has been committed for which the company or its management are liable" [*Le contrôle des entreprises – évolution et perspectives*, l'Harmattan, 2007, p.132]. We believe that the notion of unilateral commitment does indeed have a role to play in providing legal legitimacy for civil liability claims by third parties who are victims of breaches of the commitments of this nature made by companies.

⁶⁹ Extract from "Codes de bonne conduite: quand les sociétés jouent à l'apprenti législateur", Marie BRAC, research assistant, Université Paris X, Nanterre, <http://www.glose.org/CEDCACE3.pdf>

⁷⁰ A study by Alpha, "Chartes éthiques et codes de conduite: état des lieux d'un nouvel enjeu social, March 2004, available at: <http://alpha-etudes.com/admin/upload/rp290304sy.pdf>, the most-quoted standards in codes of ethics are: ILO conventions, the UDHR, the United Nations Convention on the Rights of the Child, the OECD Guidelines, the OECD Convention on Corruption, the EU Charter of Fundamental Rights, the

Commitments are global in nature, both geographically and in time. In this respect, ethical commitments faithfully reflect the notion of sustainable development - "*development which meets the needs of the present without compromising the ability of future generations to meet their own needs*"⁷¹.

To whom is it addressed?

The scope of a commitment expressed by a company is generally equivalent to that of the group of companies, with the express addition of sub-contractors and suppliers, as the Lafarge Group's code of conduct illustrates: "*the business code of conduct aims to set out a number of rules of conduct which are applicable to all employees in the group (...) as well as their representatives, agents, consultants and other external service providers that may act on behalf of the Group and/or its different entities*".

It would even be fair to assume that the scope is that of the company's **umbrella brand**, since ethical commitments are supposed to enshrine the values of the umbrella brand and other brands which represent the group's products and services. It should also be noted that the brand's perimeter must not be confused with the company's sphere of influence, which is of interest in terms of calling the parent company to account. The brand's perimeter, which extends further than the sphere of influence, may serve to define the perimeter of subjects of law who are the object of such commitments and who may make a claim if these are not fulfilled.

What is the extent of these commitments?

Individual and corporate codes of conduct may either be **private law regulations** of a binding nature such as internal regulations, or **contractual documents** if, for example, they are attached to labour contracts.

Above all, they are also communications tools, conveying the image of a company which takes its corporate and environmental responsibilities seriously. This is often achieved using very broad, neutral terminology to avoid it being legally binding for the company.

Most often, these codes provide for few or no genuine control mechanisms. In most cases, control is internal. The Electrolux code of ethics states: "Failure to comply with the provisions of this Code of Ethics can result in disciplinary action."

For the purposes of their legal scope, professionals should be distinguished from third parties. With respect to professionals, reference can be made to customary practice regarding companies' ethical charters; according to some authors, these form part of *Lex mercatoria*.⁷²

Indeed, several arguments can be put forward to justify the binding nature of ethical charters **between professionals** on the basis of contract law. For instance, the *Code of Labour Practices for the Apparel Industry* specifies the following: "*Where there is repeated failure to observe or to ensure observance of the code by a particular contractor, subcontractor, supplier or licensee, the agreement should be terminated*".⁷³ It is also conceivable that in application of UNIDROIT laws, more specifically on the basis of the notion of "*legitimate expectations*",⁷⁴ a party to a contract may terminate it on the grounds that unilateral commitments which feature in the ethical charter of the co-contracting party have not been fulfilled.

Clearly, incorporation of ethical charters into *lex mercatoria* has no direct impact as regards **third-party victims** of violations of human or environmental rights who are not parties to the contract. However, the arrival of ethical

ILO Declaration of Principles, the Global Reporting Initiatives, the Global Compact, and Standards and Reference Documents (SA 8000, AA 1000).

⁷¹ In 1984, the United Nations General Assembly entrusted Mrs. Gro Harlem Brundtland, the then Prime Minister of Norway, with a mandate to form and chair the World Commission of Environment and Development, which is today recognized as having promoted the values and principles of sustainable development. Cf. the report entitled *Our common future*, published in 1987 http://www.wikilivres.info/wiki/index.php/Rapport_Brundtland. This definition has been taken from the Brundtland report published in 1987 by World Commission of Environment and Development at the end of its working mandate.

⁷² Fabrizio Marrella - *Human Rights, Arbitration, and Corporate Social Responsibility in the Law of International Trade* - pp.25-26; Farjat - *Nouvelles Réflexions sur les codes de conduite privés*, in Fouchard, P. Lyon-Caen, A. and Kahn, P. (eds.) *Les transformations de la régulation juridique* (Paris: LGDJ, 1998), pp. 151-178.

⁷³ Clean Clothes Campaign, *Code of Labour Practices for the Apparel Industry including Sportswear*, February 1998 [reproduced in R. Mares, *Business and human rights: A compilation of documents* (Boston: Martinus Nijhoff, 2004 - quoted in Fabrizio Marrella - *Human Rights, Arbitration, and Corporate Social Responsibility in the Law of International Trade* - p.25]

⁷⁴ According to UNIDROIT Principles, art. 1.8 "A party cannot act inconsistently with an understanding it has caused the other party to have and upon which that other party has reasonably acted to its detriment as a result." [UNIDROIT Principles of International Commercial Contracts 2004 - <http://www.unidroit.org/french/principles/contracts/principles2004/blac-letter2004.pdf>].

charters into the corpus of rules which are applicable to disputes between two professionals opens up interesting possibilities for the argument that since these commitments are addressed to citizens, they become subjective rights which any citizen can avail themselves of.

NB - it is important to note here that when Mr Kasky sued Nike for false advertising, the aim was indirectly achieved, but reparation to the direct victims was not assured.⁷⁵ Nike agreed to finance auditing, educational and credit programmes for the benefit of the victims only on condition that the charges were dropped. It is to avoid victims being obliged to have recourse to "subsidiary" procedures of this nature to obtain reparation that it is worthwhile drawing parallels between the notion of a code of conduct and that of unilateral commitment.

Thus, codes of conduct constitute unilateral commitments which are a source of obligations for the issuing company and of rights for their recipients. Breach of these commitments should enable victims (external commercial partners and third parties) throughout the supply chain to avail themselves of their rights on the basis of civil liability.⁷⁶

2.2.2.3 Abuse of rights and codes of conduct

The content of multinational corporations' codes of conduct means that it can be convincingly argued that they express a desire; in them, companies exercise their freedom of expression⁷⁷ to form the basis of their

⁷⁵ In the same line EU Directive n°2005/29/CE concerning unfair business-to-consumer commercial practices in the internal market provides in its article 6.2.b that qualifies as a misleading commercial practice the *non-compliance by the trader with commitments contained in codes of conduct by which the trader has undertaken to be bound, where the commitment is not aspirational but is firm and is capable of being verified and the trader indicates in a commercial practice that he is bound by the code.*

⁷⁶ Clearly, the exact basis of such claims will differ depending on whether the plaintiff is a commercial partner or a third party; The former would be able to bring the contractual civil liability of the issuing company into play on the basis of the contract binding the parties, while third parties would be able to bring proceedings on the basis of criminal or technical liability. This distinction between the two types of civil liability is more widespread in Romano-Germanic legal systems than in Common-Law systems.

⁷⁷ In *Kasky v Nike*, Nike referred to article 1 of the US constitution which recognizes the right to freedom of speech. The response of the Supreme Court of California was to throw out this appeal to article 1 on the basis that it was a "commercial message", specifying that: "*Our holding...in no way prohibits any business enterprise from speaking out on issues of public importance or from vigorously defending its own labor practices. It means only that when a business enterprise, to promote and defend its sales and profits, makes factual representations about its own product or its own operations, it must speak truthfully...*" [in *Legal Issues in corporate citizenship*, February 2003, p.19 and 20 -

communication, particularly with a view to this being accepted by various categories of recipients (employees, shareholders, professional contracting parties, consumers and third parties as we shall see hereafter). Any breach of these commitments to act or refrain from acting constitutes an abuse of process with regard to freedom of speech. Publicly expressing a promise (as is always the case for ethical charters) which one does not have the means to keep constitutes an abuse of freedom of speech.

We believe that a link should be established between the notion of abuse of process and the content of ethical commitments issued by companies. **With respect to the supply chain, this abuse would be identified in cases where the procedures governing the use of external partners** (specifically in the case where the agreed financial terms do not enable external partners to carry out the investment required to fulfil the commitments in question) **have led or are likely to lead to consequences for the environment or individuals which are contrary to the ethical commitments expressed by the company, and by extension, against European public order.**

LESSONS TO BE LEARNED PRIMARY AND SECONDARY OBLIGATIONS

PRIMARY OBLIGATIONS

We have distinguished two categories of obligation:

3. Conventional obligations

Over and above the debate relating to the direct application to companies of certain international norms protecting fundamental rights (PIDCP, PIDESC, OECD Guidelines) it is universally acknowledged that companies must to abide by the ECHR and certain ILO conventions or face direct legal action on the part of victims.

4. Contractual obligations

The EU could impose measures similar to those which exist in French law governing construction and public works:

- requiring subsidiaries and their first-line external partners to have all external partners approved by the parent company and inform the latter of the agreed contractual terms and conditions;
- imposing an obligation of oversight on parent companies requiring them to ensure that their subsidiaries and first-line external partners have properly complied with their obligations of information to the former.

We hold that measures of this kind have the merit of clarifying the limits of obligation of social and environmental reporting and extending these to governing the supply chain.

SECONDARY OBLIGATIONS

We have thus identified two fundamental secondary obligations relating to the **abuse of rights** and **unilateral commitment**, which could be applied in several ways at the level of the European Union such that victims could take direct legal action against parent companies:

1. Precaution and Prevention

The importance of an obligation of information and the effects generated by the proposed reinforced obligation of reporting must be borne in mind in this respect. Such an obligation to report risks and the occurrence of damage in environmental and social terms should encourage parent companies to take all necessary means to prevent these. The issue for companies will be to anticipate any abuse of rights and/or violation of their unilateral commitment.

2. Reparation - 4 levels of proceedings

Proceedings by competitors - We suggest that a new anti-competitive practice should be incorporated into competition law, defined as *acting contrary to commitments expressed in individual and/or corporate codes of conduct*.

Proceedings by external partners (sub-contractors / Suppliers) - the combination of the notions of abuse of rights and unilateral commitment opens up avenues of civil liability proceedings against parent companies on the part of *external partners* who have been the victims of contractual conditions which do not enable them to fulfil their commitments, specifically to fulfil parent companies' own ethical commitments by which they are usually contractually bound. Proceedings of this type would be possible for the purposes of a recursory action if the sub-contractor has been held liable and been required to compensate for damages relating to the violation of a primary obligation. This would encourage multinational corporations to ensure that the terms of contract throughout their supply chains complied with the motion of a **sustainable contract**. Following this reasoning, it is quite conceivable that **employee representatives** from sub-contracting companies could launch such proceedings against the parent company of the prime contracting group.

Proceedings by third party victims - the benefits of an obligation of reporting combined with the civil and criminal liability regime put forward in the previous working document should be borne in mind in this respect. This would enable civil or criminal liability proceedings to be initiated by victims against the parent company, with equitable arrangements as regards the burden of proof. In this respect, victims would fulfil the commonly accepted definition of **stakeholders**.

Consumer proceedings - in addition, application of the EU Directive n°2005/29/CE concerning unfair business-to-consumer commercial practices in the internal market⁷⁸ will complement the proposed scheme. Indeed this latter provides in its article 6.2.b that *non-compliance by the trader with commitments contained in codes of conduct by which the trader has undertaken to be bound* is qualified as a misleading commercial practice. This ability for consumer associations to initiate proceedings of this nature should have a significant impact, encouraging companies to adjust their practices throughout their supply chain.

⁷⁸ Dated 11 May 2005 - <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:149:0022:0039:EN:PDF>.

2.2.3 Rules of interpretation

A few comments on the rules of interpretation which are applicable to disputes are necessary.

Good faith is a universally enshrined principle of law which is inherent to any legal order. It is *a legally binding imperative of international morality, even if it is poorly defined*.⁷⁹ Osman holds that it is "a basic principle which dominates the formation, implementation and interpretation of international contracts".⁸⁰ This principle holds that being of good faith means demonstrating loyalty, sincerity and honesty; keeping one's word, and keeping one's promises.⁸¹

According to the principle of **constructive knowledge** "if one by exercise of reasonable care would have known a fact, he is deemed to have had constructive knowledge of such fact".⁸² In this case, in application of this principle and on the grounds that companies are assumed not to be ignorant of the law (just like any other subject of law) they may not plead ignorance of the fact that any breach of their unilateral commitments exposes them to a corresponding degree of duress.

The notion of "**legitimate expectation**" on the part of investors has become customary for analysis of standards of "fair and equitable treatment". Applying this principle, a company cannot have expectations which run contrary to international customary law or contrary to fundamental rights, all the more so if these are expressed in its code of conduct.⁸³

Management "in a prudent and responsible fashion" (*gestion en bon père de famille*) - a concept derived from *bonus pater familias* in Roman law - is a behavioural model which has become a framework notion in French civil law for which the magistrates' appraisal is sovereign. Such parties are deemed to be

"prudent and responsible" if they are diligent and attentive. They should look after assets as though they were their own, and must act with particular care when implementing their contractual obligations. While the form of the expression itself harks back to the time at which the Civil Code was first drafted, the content of this notion has evolved in line with contemporary society and remains a point of reference⁸⁴. A parallel may be drawn with the concept of the "reasonable person"⁸⁵ in English law, but the construct is not identical.⁸⁶ Today, a preference for promotion of reasonableness can be inferred. Magistrates before whom proceedings are brought will have to ask themselves "what would a reasonable person have done in such-and-such a situation?"

The rule of interpretation according to which *contractual law established under the dominant influence of one party must be interpreted in favour of the other party* is also very useful inasmuch as it may restore the balance

⁸⁴ "A type of person who is normally prudent, careful and diligent, to which the Civil Code refers, especially to determine obligations incumbent on such persons who look after (Civ. Code, a. 1137, 1880, 1962), administer (Civ. Code. a. 450, 1374) or use (C. civ. a. 601, 1728, 1806) others' assets, on the assumption that a model head of household will be reasonably able to manage assets wisely; This traditional reference is comparable to that of a "reasonable person" Association Henri Capitant, under the direction of G. CORNU, Vocabulaire juridique.

⁸⁵ "There is no uniquely accepted standard of what constitutes a "reasonable person"; this varies in terms of the difficulty and intrinsic nature of the business being carried out. For instance, to assess the nature and extent of duties that are required of a professional in the exercise of their profession, magistrates obviously do not refer to what could normally be expected of a non-professional, but to what could be reasonably expected of a "good professional in this field" (...) i.e. the standard of the "reasonable person" must be adjusted depending on the nature of the activity in question", as well as taking into account both the context and the postulate according to which "the principle of assessment [is applied] in abstracto inasmuch as it is in the very nature of a "reasonable person" to adjust their behaviour to the circumstances in which they find themselves at any given time", G. VINEY and P. JOURDAIN, *Traité de droit civil*, dir. J. GHESTIN, Les conditions de la responsabilité, 2nd edn. L.G.D.J. 1998, no. 464, quoted in On "Reasonableness" in International Commercial Law, Guillaume Weiszberg, Thesis presented on November 7 2003, Université de Panthéon Assas (Paris II), Université Panthéon-Assas (Paris II) Thesis Prizewinner

⁸⁶ Mr. SEYRAT has also written a thesis on this theme and has defined this concept precisely, showing how its formation is different between Romano-Germanic law and Common-Law systems. - S. SEYRAT, *Le bon père de famille, la signification et la fonction dans le droit*, th. Paris II 1985, dir. D. TALLON, "in this respect, French law "descends" from the general pre-established principle to particular cases, whilst English law does not "construct" general principles, but rather "standards" from particular cases. French law derives solutions from general principles, one of which is the reference to behaviour as a "prudent and responsible person" in article 1137 of the Civil Code (...) in English law, the approach is different and takes the opposite direction. English law specialists "identify" or "infer" selective rules of law from the facts of a specific case, which do not rise to become key principles but which do form part of the definition of what is reasonable. In this way, a concept of the "reasonable person" emerges in terms of models. In the absence of a civil jury, attempts by English magistrates to justify why they have accepted or rejected arguments from parties by describing behaviour "as it should be" lead them to formulate descriptive (and perhaps somewhat moralising) characterisations of the behaviour in question. And thus is formed the 'reasonable man'".

⁷⁹ Pierre Lalive, "Sur la bonne foi dans l'exécution des contrats d'État", in *Mélanges offerts à Raymond Vander Elst*, Bruxelles, Némésis, 1986, p. 432.

⁸⁰ Filali Osman, *Les principes généraux de la lex mercatoria - Contribution à l'étude d'un ordre juridique anational*, Paris, L.G.D.J., 1992, p. 27.

⁸¹ In *Dictionnaire de la Culture juridique*, PUF, 2003, p.143.

⁸² Yann Queindec, *Propositions pour un arbitrage international*, speech at the first international Conference on rights of access to water, Marseille, 25 November 2006, p.9].

⁸³ For more information on the role of international custom in contributing to the establishment of a legal framework for corporate social and environmental responsibility, cf Yann Queindec, *Les principes directeurs de l'OCDE à l'intention des entreprises multinationales - un statut juridique en mutation*, June 2007 - http://asso-sherpa.org/reflexions/SHERPA%20Etude%20Juridique%20OCDE%20V1_50607.pdf].

between prime contractors and partners in the supply chain.⁸⁷

Commonly accepted use of these interpretive principles would enable magistrates and any other institutions responsible for stating the law before whom claims are brought to consider companies' attitudes in the light of these principles, specifically any discrepancies between their commitments and the facts with respect to related damages. Intelligent use of such principles would bring an end to the discretionary interpretation of standards of social and environmental responsibility applied by multinational corporations today.

2.2.4 Resources for settling disputes

2.2.4.1 Anticipating disputes

Without going into detail, it is worth emphasising the importance of involving investment funds, ethical ranking agencies, benchmarking institutions, statutory auditors and financial market regulators; all of these play a crucial role at their respective levels. They should exercise their role on the basis of social and environmental data forming part of a reinforced obligation of reporting, and respond accordingly (refusing or withdrawing investment, awarding low grades, systematically constituting reserves in company funds, expressing reservations or even refusing to certify corporate financial statements, etc).

The World Customs Organisation (WCO) could also play a fundamental role in overseeing logistics chains. The WCO's SAFE Framework of Standards is "*an effective mechanism to protect international logistics chains against the effects of terrorism and other forms of trans-boundary crime*".⁸⁸ It would thus be possible to require companies to present customs authorities with a document certifying compliance of their product manufacture with environmental norms and human rights.

The preventive role of the obligation of reporting will be fully effective only if all these parties become involved, helping consumers to

be informed. The role of stakeholders is also a crucial link.

2.2.4.2 Dispute resolution

Aside from civil and/or criminal liability proceedings, which we have recommended, particularly within the framework of liability conferred by a reinforced obligation of reporting, links with existing measures in the field of corporate social and environmental responsibility also desirable. Specifically, we have in mind the National Contact Points which are responsible for controlling proper application of the OECD Guidelines with respect to multinational corporations.

The OECD National Contact Points could be usefully involved at two levels.

- 1) as a minimum, to relay information to jurisdictions in which proceedings are brought, which often lack the resources to complete the kind of investigation required by offshore disputes properly. They could even be granted a supervisory role for the proper implementation of reparation measures and improvement of practices;
- 2) with respect to specific instance procedures, they could be beneficial for dispute resolution - although this would involve reforming their *modus operandi* and a move towards arbitration procedures. It could be envisaged that, similarly to the ICSID for investment law issues, NCPs could become an arbitration instrument devoted to corporate social and environmental responsibility.⁸⁹

3 ASSESSMENT OF PROPOSALS

The present section is a logical extension to the previous one in which the issue is to establish an interpretive framework for situations that multinational corporations may encounter on the basis of the legal foundations which have been identified, so as to enable any given company, its stakeholders and magistrates

⁸⁷ Catala [Revue JP Commerciale, 2007, p.187].

⁸⁸ WCO, "SAFE Framework Standards", available on the WCO site: www.coomd.org. Moreover, this proposal would be in complete agreement with arguments relating to receiving (*recei*) set out in the preceding paper.

⁸⁹ It should be noted that recourse to arbitration is a solution which avoids the obstacles within International Private Law with respect to the grounds of violation of the public order: "*Under French jurisprudence, the President of the Paris Tribunal de Grande Instance may exceptionally be authorised (...) to assist in the setting up of an arbitration tribunal if "the attitude of the normally competent foreign judge would, with respect to the party requesting arbitration, be equivalent to a genuine denial of justice"*" [Homayoon Arfazadeh, *Ordre public et arbitrage international à l'épreuve de la mondialisation*, 2005, p. 63 and 64].

before whom proceedings may be brought to resolve a dispute.

We have identified two iconic cases which have generated two distinct types of claim, one using the OECD procedure of the specific instance, and the other using legal process.

3.1 Adidas and the OECD procedure of specific instance.

3.1.1 Facts of the case. In 2002, Clean Clothes Campaign Germany (CCC) brought a case before the National Contact Point in Germany, where Adidas is headquartered, for failure to apply the OECD Guidelines in two factories where Adidas sub-contracted work in Indonesia. Following OECD specific instance procedure, a discussion process was implemented between the parties, with the NCP acting solely in its capacity as mediator.

Two years later, Adidas had made some efforts, for instance to rehabilitate some employees who had been illegitimately sacked, and to implement a better control process for its sub-contracting chain. However, the conclusions of this cycle of negotiations were not very positive, because the parties could not come to an **agreement on the means of action to be implemented and on the alleged violations of rights.**

3.1.2 Complaints with respect to Adidas.

Adidas was criticised for having **refused to allow workers in these factories to constitute organisations and carry out collective bargaining.** CCC also criticised it for having exercised pressure and intimidation against unionised employees who wanted to negotiate salary increases for overtime - some workers were paid these hours, and others were not. The intimidation involved ranged from threats relating to their health and/or safety to arrests, dismissals and relocations to other factories.

Adidas was also criticised for **not having provided a minimum standard of living for its employees, such that in some cases, employment could be qualified as forced labour.**

In terms of discrimination, unionised employees were discriminated against;

However, the employees that underwent the most discrimination were the women, who were required to live separately from their children. The working conditions of these women were therefore incompatible with family life.

Allegations relating to **health and safety** in the factories were also made.

3.1.4 Primary obligations of a contractual nature that CCC accused Adidas of having breached:

- OECD guidelines, Part I, Chap. IV paragraph IV.1, sub paragraph IV.1.A:

"Enterprises should respect the right of their employees to be represented by trade unions and other bona fide representatives of employees, and engage in constructive negotiations, either individually or through employers' associations, with such representatives with a view to reaching agreements on employment conditions."

- OECD guidelines, Part I, Chap. IV paragraph IV.1, sub paragraph IV.1.D:

"Enterprises should not discriminate against their employees with respect to employment or occupation on such grounds as race, colour, sex, religion, political opinion, national extraction or social origin, unless selectivity concerning employee characteristics furthers established governmental policies which specifically promote greater equality of employment opportunity or relates to the inherent requirements of a job."

- Part II, chapter II paragraph II.7

"Enterprises should develop and apply effective self-regulatory practices and management systems that foster a relationship of confidence and mutual trust between enterprises and the societies in which they operate."

- ILO international conventions

3.1.5 Outcome of the dispute. At the end of the day, in accordance with the procedure suggested by the OECD, which works on a voluntary basis, Adidas was under absolutely no obligation to make good damage sustained by the victims of these infringements and the

measures to be implemented to improve the situation were left entirely to its own discretion.

3.1.6 Criticisms of the OECD procedure.

Today, CCC regrets that the NCP did not have broader investigative powers, with its own budget, which would have enabled it to carry out proper investigations. In the event, CCC, which is a small NGO, was left to find its own funds to prove the facts of the case, which inevitably created an **imbalance between the parties**, given that the company in question had a turnover running into hundreds of millions of dollars. This meant that CCC could not carry out all the necessary investigations. CCC also regrets that no **appeals process** was implemented during this complaints procedure, which would have enabled better results to be obtained. If the proceedings brought before the National Contact Point had led to a **court action**, the victims would certainly have been able to obtain damages, which was not the case here.⁹⁰

3.1.7 Adidas and its supply chain management today.

The basis for Adidas's supply chain management can be found in its Standards of Engagements (SoE), the management of which is entrusted to its Social and Environmental Affairs department, a team of 33 people responsible for ensuring that the SoEs are complied with throughout the sub-contracting chain and within the group itself.

In addition to the SoEs, further guidelines were circulated internally in 2004 and then in 2005 to the group's various sub-contractors. One of these guidelines provides for the **application of the SoEs, as well as sanctions and reparation in the event of these being breached**. These sanctions may entail the termination of agreements in the event of serious violations and/or repeated failure to comply; notice of stoppage of business in the event of processes used in the factory having harmful consequences on the environment; investigation by third parties if breach of the SoEs or local laws becomes an issue of public interest; warning letters in the event of repeated failure to comply with the SoEs; implementation of special projects to address specific problems

According to Adidas's 2004 activity report, for instance, several warning letters were sent to some sub-contractors:

"Typically, warning letters were issued because of excessive working hours, double bookkeeping and the falsification of payroll and time records, lack of management commitment to remedial actions (usually over extended periods of time and following frequent requests and visits), plus other issues such as the presence of banned chemicals, poor health and safety and forced labour. On any given issue, three warning letters will usually result in an immediate recommendation to terminate."

In its activity report, Adidas also presents the various resources they intend to use to provide better management of their sub-contracting chains, such as audits (by teams from within the group or from outside it), training for managers of certain factories for better application of the SoEs, and certification to ensure that their sub-contractors comply properly with the SoEs.

3.1.8 What would have been the impact of our proposals in the same circumstances?

The proposals set out in this document could have found an expression at two levels:

Prevention - Firstly, application of our suggested binding obligation of social and environmental reporting would have provided Adidas with a very strong incentive to prevent the occurrence of damage by exercising all its influence. This would have resulted in stringent selection criteria being applied for external partners and the implementation of sustainable relationships; the additional costs would be offset by better guarantees of supply chain reliability and a decrease in legal exposure.

Dispute resolution - Recourse to the procedure offered by reformed and adequately funded OECD National Contact Points could have occurred in a process of arbitration rather than mediation, with the implementation of monitoring of appropriate corrective measures involving all stakeholders.

Sanctions - Investment funds, ethical ranking agencies and statutory auditors would all have exercised their relevant roles with a resulting change in attitude on the part of Adidas.

⁹⁰ proposals by Clean Clothes Campaign, 15 Sept 2004, "Clean clothes campaign Germany's final assessment on the outcomes of the OCDE complaint case", available sur www.oecdwatch.org

Moreover, consumer associations would have been able to exercise pressure on Adidas by suing on the grounds of false advertising.

Reparation - In the event of the above measures being unsuccessful, the employees could (individually, via their union representatives or by means of any properly appointed NGO) have initiated civil liability proceedings directly against the parent company.

3.2 The Nike group and misleading advertising

The Nike case provides a further illustration of the control that a company may exercise over a sub-contracting chain with respect to CSR.

3.2.1 Nike and its sub-contractors.

Criticisms of Nike became particularly incisive during the 90s; they related mainly to the deplorable conditions endured by workers in their sub-contracting factories in Pakistan, Cambodia, Vietnam and China. Initially, Nike refused to accept any responsibility whatsoever with respect to these workers, since it did not consider them to be its own employees. In 1992, Nike eventually acknowledged that it was important to ensure that its sub-contractors abided by the standards of international law, and required them to comply with codes of conduct which were displayed in their factories. These codes proved ineffective and Nike had to carry out more detailed inspections. However, this did not prevent continuing human rights violations, and in addition to a large number of NGO-backed campaigns against it, Nike was also the target of legal action.

3.2.2 Kasky vs Nike in the US courts. In 1998, a US citizen sued Nike with respect to the working conditions in its sub-contractors' factories, on the basis of false advertising. The first two instances ruled that Nike's declarations with respect to its policy of compliance with human rights did not amount to advertising. Mark Kasky then appealed to the Supreme Court of California, which reversed the decision, ruling that public declarations by the company amounted to advertising communications and were therefore liable to incite people to buy Nike's products. Nike appealed in turn to the Supreme Court of the United States, holding that this ruling called into question companies' freedom of speech. This court ruled itself incompetent in July 2003. However, by

qualifying Nike's use of its freedom of speech as abusive, it is highly likely that Nike would have been compelled to pay damages.

3.2.3 Outcome of the dispute. Three months later, the matter was settled in an out-of-court agreement between the two parties who both agreed that *"it is more worthwhile strengthening measures to oversee sub-contractors' working conditions and improve the latter than to waste more time and money on lawsuits."* Thus Nike committed itself to paying \$1.5 million to implement auditing programmes and finance educational programmes. The whole of this sum was paid to the Fair Labor Association, an American organisation bringing together companies, universities, consumer associations and NGOs, whose mission is to assess working conditions and improve the practices of its members' sub-contractors.

3.2.4 Fresh awareness on the part of Nike.

It is important to note that, unlike the situation in France, where social reporting has become mandatory, in the United States, publication of reports of this nature are still voluntary. This means there are no provisions in the event of false declarations. The issue then becomes one of certification of the report by organisations outwith the groups in question. Today, many companies employ the services of this type of organisation to avoid legal costs seen here. However, Nike went even further in its 2005 social responsibility report by publishing the list and location of its production workshops, enabling an independent assessment of working conditions. This made Nike the first multinational corporation to voluntarily make public the whole of its supply and production chain.

3.2.5 Persistent violations along the supply chain.

What is more, in this report Nike admitted that *"in some factories where its products were manufactured, employees were subject to various forms of harassment and were forced to work overtime"*. The group also acknowledge that some *"practices which have been highlighted are still being implemented in some workshops where employees are exploited"*. An audit carried out by Nike revealed cases of physical and/or verbal harassment in over a quarter of its factories in South-East Asia. Between 25 and 50% of workshops in the region restricted access to toilets and drinking water during working hours. In over half of the Asian factories, standard

production activity required employees to work over 60 hours a week, according to the group's audit. Employees refusing to work overtime were penalised on 10% of the production sites.

3.2.6 What would have been the impact of our proposals in the same circumstances?

As with the previous case, the proposals set out in this document could also have been expressed here.

In addition, it should be noted that Nike's current practices, which have considerably improved in terms of transparency, are similar to the requirements of the binding obligation of reporting which we have suggested, although they do not enable any victim, and more specifically employees in these factories, to initiate civil liability proceedings against Nike. In this report, Nike expressly recognizes violations which take place in its sub-contractors' factories. Measures, including auditing, have been taken but these remain insufficient. These audits make it possible to confirm whether or not Nike is abiding by its primary obligations, but where this is not the case, they do not enable victims to obtain reparation for the violations to which they have been subject, and Nike will not be liable for any sanctions since any action decided by the company to avoid any such breaches remains purely voluntary in nature.

As Hannah Jones, vice-president of Nike and director of corporate responsibility, admits: *"(...) no single company can change practices in an entire sector, but we know that to respond to consumer preoccupations with respect to this issue, we must work with the stakeholders"*.

CONCLUSION

As we indicated in the introduction, all the mechanisms implemented to ensure that human and environmental rights are respected with respect to supply chains run up against the absence of binding legal provisions. The proposals set out in this document aim to plug this gap. Far from restricting European companies' freedom of initiative, the application of these measures would improve risk forecasting and legal security for both companies and victims. This is also a requirement in terms of fair competition. Mechanisms of this nature would promote companies whose practices are consistent with their ethical commitments and which suffer from unfair competition on the part of some competitors for whom such commitments are publicity gimmicks which are not followed through on.

This document should enable companies to contribute, commensurately with their influence, to sustainable development and achieve what is commonly known as the "triple bottom line": i.e. incorporation of the three objectives generally assigned to sustainable development into the company's own objectives: economic prosperity, social justice and environmental quality.⁹¹

The effects generated by such criteria raise issues about how they will be received by financial markets. It is interesting to note that Gary Pfeiffer (CEO of DuPont), responding to defenders of sustainability who often say that "*Wall Street has no conception of sustainability*" says that, on the contrary, "*Wall Street's legendary obsession with the short-term is in fact an obsession with accumulating future benefits.*" In other words, he explains that "*Wall Street is satisfied when a company*

- *will earn more money in the future,*
- *earns money today rather than tomorrow,*
- *and takes less risks.*

In a rapidly-changing market, these three criteria may constitute an argument for

investing in sustainable innovation. If the three criteria are taken in reverse order, it can be noted that sustainable economic choices often reduce risks, particularly the risk from lawsuits and regulatory changes."⁹²

By buttressing voluntary measures with foreseeable sanctions, it can be asserted that companies will have greater incentives than ever before to do everything within their power to reduce, prevent and repair social and environmental damage generated by their activity.

To achieve this, multinational corporations will need to abandon some attitudes of mistrust. For instance, it is no longer acceptable that, under the cover of representative organisations,⁹³ multinational corporations investing in China oppose the adoption of labour norms which correspond to those of the ILO.⁹⁴

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⁹¹ Introducing social and environmental criteria into management control of supplier relations would propel CSR right to the heart of economic activity; it is hardly surprising that profit-based objectives dominate and that there is such significant resistance as soon as a conflict emerges within the "triple bottom line" objectives. [in *Contrôle et RSE aux frontières de l'entreprise: la gestion responsable de la relation fournisseurs dans les grands groupes industriels*, p.17 - <http://www.iae.univ-poitiers.fr/afc07/Programme/PDF/p202.pdf>].

⁹² Alex Steffen, *Changer le Monde – Un guide pour le citoyen du XXI^e siècle*, p. 400, 2007, La Martinière.

⁹³ The American Chamber of Commerce in Shanghai, The US-China Business Council, European Chamber are among the organisation defending the interest of numerous major multinationals in China. Annabel Short [presentation to the Polish OECD National Contact Point, Warsaw, November 14, 2007].

⁹⁴ Yun Gao describes the situation as follows: "*The number of opinions received by the legislative body amounted to a record in the history of pre-legislation consultation with the public*", "*Some labour academicians name the situation as: the unprecedented crisis of labour law in the context of globalisation*", "*Many commentators rightly pointed out that the behaviour of MNCs in China is in direct contradiction with CSR commitment that they have been promoting for years, and the conduct of MNCs just confirms the mistrust from those who doubt with MNCs' motivation in promoting CSR.*" [Yun Gao "*Secondary Effect*" in *Implementation of CSR in Supply Chain in Gouvernance, droit international et responsabilité sociétale des entreprises*, Organisation internationale du Travail, 2007, working document no.182, pp.122 - <http://www.oit.org/public/french/bureau/inst/download/dp18207.pdf>].



ANNEXES

Tableau 1 – règles existantes en matière de transparence de la chaîne d’approvisionnement

DOMAINE	NORME	DESTINATAIRE	PROTECTION MISE EN PLACE	NIVEAU DE CONTROLE AUTORITE DE CONTROLE	RÉGIME DE RESPONSABILITÉ
Industrie diamantaire	<p>KPCS Kimberley Process Certification Scheme</p> <p>Système de certification du Processus de Kimberley (à partir du 1/01/2003)</p> <p><u>Texte fondateur</u> : Déclaration d’Interlaken 5 novembre 2002</p>	<p>Destinataires réels : 71 pays signataires en 2006 de l’accord.</p> <p>Observateurs :</p> <p>- Industriels du diamant : Charte annexée (valeur déclarative) signée</p> <p>- ONG : Participation au processus dans son ensemble</p>	<ul style="list-style-type: none"> - Présidence tournante du Processus : UE (DG Relations Extérieures de la Commission) depuis 01/01/2007, 2006 : Botswana, 2005 : Russie, 2004 : Canada, 2003 : Afrique du Sud - législation nationale obligatoire à transposer avec système de contrôle intégré (autorité nationale responsable) - Toute cette industrie est verrouillée car un diamant ne peut provenir que d’un pays signataire de l accord - Certificat : définitions des normes minimales requises⁹⁵ - Obligation de fournir et de publier sur un intranet des statistiques à jour (détection d’anomalies) 	<p>NIVEAU - traçabilité de la mine à l’export (Points de contrôles spécifiques : production artisanale, commerce, taillage, polissage)</p> <p>AUTORITE -autoévaluation et autorégulation par le pays signataire mais doit être assermenté par une autorité indépendante.</p> <ul style="list-style-type: none"> - mission ad hoc d’experts financé par tous les pays signataires (évaluation par les pairs) - inspections nationales des imports et des exports - participation importante des ONG dans le procédé - Pas de mécanisme de suspension en cas de non conformité 	<p>Obligation de résultat pour les pays ⁹⁶ donc législations nationales contraignantes à mettre en place⁹⁷</p> <p>Volontariat pour l’industrie du diamant représenté par le World Diamond Council</p> <p>Pouvoir de dénonciation donc des ONG :</p> <p>Campagne <i>Combating Conflicts Diamonds</i></p>

⁹⁵ Titre « Certificat du processus de Kimberley » avec un énoncé « Les diamants bruts contenus dans ce chargement ont été traités conformément aux dispositions du système de certification du processus de Kimberley pour les diamants bruts ». Mentions obligatoires : pays d’origine, traduction anglaise, numérotation unique plus le code pays, certifié inviolable et infalsifiable, date de délivrance et d’exportation, autorité émettrice, identité importateur, exportateur, poids et masse carats, valeur en \$ US, nombre de lots, système harmonisé des marchandises, validation par l’autorité d’exportation

⁹⁶ Décision par consensus tous les ans lors de la réunion plénière

⁹⁷ Canada. *Loi sur l’exportation et l’importation des diamants bruts* (LEIDB), entrée en vigueur le 1^{er} janvier 2003. Paragraphe 41(1) pénalités prévues :a) si mise en accusation, l’amende est fixée par le tribunal plus un emprisonnement maximal de 10 ans, ou l’une de ces peines;b) par procédure sommaire, une amende maximale de 25 000 \$ et un emprisonnement maximal de 12 mois, ou l’une de ces peines.

Etats-Unis. Le « *Clean Diamond Trade Act* », entrée en vigueur 30 juin 2003, amendes et peines d’emprisonnement pouvant aller jusqu’à dix ans. **SECTION 8. ENFORCEMENT.**(a) IN GENERAL.—In addition to the enforcement provisions set forth in subsection (b)—(1) a civil penalty of not to exceed \$10,000 may be imposed on any person who violates, or attempts to violate, any license, order, or regulation issued under this Act; and(2) whoever willfully violates, or willfully attempts to violate, any license, order, or regulation issued under this Act shall, upon conviction, be fined not more than \$50,000, or, if a natural person, may be imprisoned for not more than corporation who willfully participates in such violation may be punished by a like fine, imprisonment, or both.(b) IMPORT VIOLATIONS.—those customs laws of the United States, both civil and criminal, including those laws relating to seizure and forfeiture that apply to articles imported in violation of such laws shall apply with respect to rough diamonds imported in violation of this Act. (c) AUTHORITY TO ENFORCE.—the United States Bureau of Customs and Border Protection and the United States Bureau of Immigration and Customs Enforcement are authorized, as appropriate, to

<p>Industrie du bois</p>	<p>FSC (Forest Stewardship Council Certificate) Projet soutenu et établi avec le soutien d'ONG telles que WWF et Greenpeace</p>	<p>Entreprises du bois</p>	<ul style="list-style-type: none"> - Mise en place de contrôle à des points de contrôle précis pour ne pas mélanger les bois - Cahier des charges technique précis adapté à chaque pays, région. - séparation physique des matériaux obtenue par stockage ou par différenciation des lignes de production. - identification du bois par marquage sur la grume, le plot, la palette ou l'emballage tenue d'une documentation sur les contrats de vente, d'achat, procédés internes à l'entreprise. - Vérification de l'atmosphère de l'entreprise : contrats entre fournisseurs et sous traitants qui doivent avoir un numéro de certificat FSC aussi ; rapport exact entre vendu et acheté. - Pour être labellisé il faut atteindre le pourcentage requis de bois ou de service certifié, pourcentage variant en fonction du type d'entreprise. - Le respect des normes internationales est intégré au certificat. 	<p>NIVEAU – Traçabilité de toute la chaîne par ce certificat valable pendant 5 ans quand tout le respect de ce processus est établi.</p> <p>AUTORITE - Audit d'un organisme de contrôle indépendant sur 3 critères essentiels (environnement, droits sociaux des communautés et travailleurs du domaine forestier et une gestion économique viable)</p>	<p>Volontariat au départ mais qui est devenu un passage obligé pour travailler dans ce secteur là.</p>
<p>Industrie du bois</p>	<p>PEFC Plan for Endorsement Forest Certification Projet soutenu par associations de travailleurs</p>	<p>Entreprises du bois</p>	<p>Norme de certification avec un spectre moins large : seules les dispositions forestières ou nationales sont demandées.</p>	<p>NIVEAU : traçabilité de toute la chaîne mais qui atteste d'une volonté de mise en œuvre future.</p>	<p>Volontariat au départ mais qui est devenu un passage obligé pour travailler dans ce secteur là.</p>

enforce the provisions of subsection (a) and to enforce the laws and regulations governing exports of rough diamonds, including with respect to the validation of the Kimberley Process Certificate by the exporting authority. http://www.treasury.gov/offices/enforcement/ofac/legal/statutes/pl108_19.pdf

Union Européenne. Règlement CE N° 2368/ 2002 du Conseil du 20 décembre 2002 mettant en oeuvre le système de certification du processus de Kimberley pour le commerce international des diamants bruts rend applicable le processus directement dans tous les états membres.

DOMAINE	NORME	DESTINATAIRE	PROTECTION MISE EN PLACE	NIVEAU DE CONTROLE AUTORITE DE CONTROLE	RÉGIME DE RESPONSABILITÉ
Traçabilité alimentaire	<p>Règlement 178/2002, entré en vigueur le 1/ 01/ 2005</p> <p>Transcription en droit français depuis le 1 01 2003 et par la Loi n° 2004 – 232. Depuis 2007, principe de précaution et la traçabilité sont devenus obligatoires (conditionne l'agrément sanitaire et la responsabilité de l'entreprise).</p>	Tout pays et tout citoyen de l'UE puisque norme directement applicable en tant que telle.	<p>Contrôles <i>à tous les stades</i> mais aussi sur l'hygiène du personnel, le prélèvement d'échantillons, l'examen des systèmes de contrôle mis en place par l'entreprise...</p> <p>Traçabilité⁹⁸ globale d'une denrée alimentaire de la production jusqu' à la distribution de façon segmentée. La vision globale est obtenue par les autorités compétentes. L'Autorité Européenne de Sécurité des Aliments a même été mise en place pour permettre d'évaluer les risques, les gérer et les communiquer⁹⁹. Chaque professionnel est tenu de l'amont avec son fournisseur et de l'aval avec son propre client.</p> <p>Obligation de suivi des lots donc connaissance du jour de remise des lots</p> <p>Si suspicion de risque sanitaire ou de non-conformité du produit, obligation de ne pas empêcher ou décourager l'action des autorités compétentes et d'informer effectivement les consommateurs (Article 19 §1, 20 §1 Règlement 178 / 2002)</p> <p>CQ retrait possible dans la chaîne de production ou rappel auprès des consommateurs</p>	<p>Contrôle interne par l'entreprise et la traçabilité globale est assurée par l'Autorité Européenne de Sécurité des Aliments (Règlement (CE) No 178/2002 du Parlement européen et du Conseil du 28 janvier 2002)</p> <p>Contrôle possible « <i>à tous les stades de la production, de la fabrication et de l'importation dans la communauté, du traitement, de l'entreposage, du transport, de la distribution et du commerce</i> », Directive du Conseil du 14 juin 1989 relative au contrôle officiel des denrées alimentaires (89/397/CEE), article 4.1 alinéa 3.</p>	<p>Obligation de prudence, précaution, prévention, et d'information pour les professionnels du secteur.</p> <p>Obligations de loyauté et de transparence pour les industriels et les distributeurs envers les consommateurs, (contrôle, archivage des flux, obligation de restitution dans les 4 heures, assurer la traçabilité précédente et suivante).</p>

⁹⁸ Définition selon l'International Standard Organisation de la Traçabilité : « aptitude à retrouver l'historique, l'utilisation, ou la localisation d'un article ou d'une activité, au moyen d'une identification enregistrée. Elle permet de suivre et donc de retrouver un produit ou un service depuis sa création (production) jusqu'à sa destruction (consommation) », cité in www.wwf.fr/content/download/442/2066/version/1/file/Proforet5.pdf

⁹⁹ Règlement (CE) No 178/2002 du Parlement européen et du Conseil du 28 janvier 2002.

Tableau 2 – Règles applicables en droit européen de la concurrence et exemple français de transposition

IDENTIFICATION DES NOTIONS-CLES	NORMES FRANÇAISES ET EUROPEENNES	CONDITIONS	APPLICATION AU GROUPE	CONDITIONS DE LA RESPONSABILITE DE LA SOCIETE-MERE
La société comprend toute entité autonome ¹⁰⁰ exerçant une activité économique ¹⁰¹ ; elle vise tous les opérateurs économiques exerçant une activité commerciale et intervenant sur un marché, constitués sous forme de société ou non, et disposant d'une autonomie suffisante pour décider de commettre une pratique anticoncurrentielle.	Articles 81-1 TCE ¹⁰⁵ et L-420-1 du code de commerce français ¹⁰⁶ prohibent l'entente anti-concurrentielle.	- Au moins deux entreprises autonomes. En droit français, « <i>Sont considérées comme autonomes, les structures qui définissent leur propre stratégie commerciale, financière et technique et qui peuvent s'affranchir du contrôle hiérarchique de la société mère.</i> » ¹⁰⁷	L'entente intragroupe n'est pas prohibée car elle associe deux filiales non autonomes d'un même groupe ¹⁰⁸ .	La filiale citée sur la liste des membres du groupement constitutif de l'entente est responsable de l'entente, SAUF SI <ul style="list-style-type: none"> - plusieurs filiales du même groupe ont participé à l'infraction - ou si des preuves précises impliquent la société-mère¹⁰⁹. Le TPICE ¹¹⁰ a confirmé ¹¹¹ : la société-mère est responsable si un membre du directoire de la société-mère a participé aux réunions de l'entente en qualité de représentant de la filiale.

¹⁰⁰ CJCE, 12 juillet 1984, Hydrotherm, aff. 170/83, Rec. p 2999.

¹⁰¹ CJCE, 23 avril 1991, Höfner, aff. C-641/90, Rec p 1979, att. 21.

¹⁰² CJCE, 23 avril 1991, Höfner, aff. C-641/90, Rec p 1979, att. 21.

¹⁰³ Définition donnée par l'article 354 de la loi n°66-537 du 24 juillet 1966 : Lorsqu'une société possède plus de la moitié du capital d'une autre société, la seconde est considérée pour l'application de la présente section, comme filiale de la première.

¹⁰⁴ CJCE, 14 février 1978, United Brands Company et United Brands Continental BV c/ Commission, aff. 27/76, Rec. p 207.

¹⁰⁵ **Art 81-1 TCE** : « Sont incompatibles avec le marché commun et interdits tous accords entre entreprises, toutes décisions d'associations d'entreprises et toutes pratiques concertées, qui sont susceptibles d'affecter le commerce entre États membres et qui ont pour objet ou pour effet d'empêcher, de restreindre ou de fausser le jeu de la concurrence à l'intérieur du marché commun, et notamment ceux qui consistent à :

- fixer de façon directe ou indirecte les prix d'achat ou de vente ou d'autres conditions de transaction;
- limiter ou contrôler la production, les débouchés, le développement technique ou les investissements
- répartir les marchés ou les sources d'approvisionnement
- subordonner la conclusion de contrats à l'acceptation, par les partenaires, de prestations supplémentaires qui, par leur nature ou selon les usages commerciaux, n'ont pas de lien avec l'objet de ces contrats. »

¹⁰⁵ **article L. 420-1** du Code de commerce : Sont prohibées, lorsqu'elles ont pour objet ou peuvent avoir pour effet d'empêcher, de restreindre ou de fausser le jeu de la concurrence sur un marché, les actions concertées, conventions, ententes expresses ou tacites ou coalitions, notamment lorsqu'elles tendent à :

- limiter l'accès au marché ou le libre exercice de la concurrence par d'autres entreprises
- faire obstacle à la fixation des prix par le libre jeu du marché en favorisant artificiellement leur hausse ou leur baisse
- limiter ou contrôler la production, les débouchés, les investissements ou le progrès technique
- répartir les marchés ou les sources d'approvisionnement.

¹⁰⁶ **article L. 420-1** du Code de commerce : Sont prohibées, lorsqu'elles ont pour objet ou peuvent avoir pour effet d'empêcher, de restreindre ou de fausser le jeu de la concurrence sur un marché, les actions concertées, conventions, ententes expresses ou tacites ou coalitions, notamment lorsqu'elles tendent à :

- limiter l'accès au marché ou le libre exercice de la concurrence par d'autres entreprises
- faire obstacle à la fixation des prix par le libre jeu du marché en favorisant artificiellement leur hausse ou leur baisse
- limiter ou contrôler la production, les débouchés, les investissements ou le progrès technique
- répartir les marchés ou les sources d'approvisionnement.

¹⁰⁷ Décision du 4 mai 2001 relative à des pratiques relevées lors de marchés de fabrication et de mise en œuvre d'enrobés bitumeux sur les routes départementales de l'Isère.

¹⁰⁸ CJCE, 24 octobre 1996, Vito, aff. C-73/95 P, Rec. p 1-5487. CJCE, 13 juillet 1966, Gründig, aff. 56/64, Rec p 429.

¹⁰⁹ Décision "carton" du 13 juillet 1994 (94/601/CE) de la Commission Européenne points 147 et s.

¹¹⁰ Arrêt T-309/94 du 14 mai 1998, NV Koninklijke KNP BT contre Commission.

¹¹¹ Point 43.

<p>Le groupe de société est¹⁰² un ensemble constitué de la société-mère et de ses filiales dans la mesure où les filiales sont dépendantes de la société-mère, et où la société-mère exerce un pouvoir de direction sur ses filiales. En droit français, la dépendance est reconnue lorsque plus de 50% du capital de la filiale est détenu par la maison-mère¹⁰³.</p> <p>La position dominante est une position de puissance économique permettant à une entreprise, individuellement ou conjointement avec d'autres, de se comporter de manière indépendante de ses concurrents, de ses clients et en fin de compte du consommateur¹⁰⁴.</p>	<p>Articles 82 TCE¹¹² et L 420-2 du code de commerce français¹¹³ prohibent l'abus de position dominante (APD).</p>	<ul style="list-style-type: none"> - une position dominante détenue individuellement ou collectivement - une exploitation abusive de cette position - une affectation du commerce intérieur (en droit français) et du commerce entre États-membres (en droit communautaire) - Le TPICE¹¹⁴ a posé quelques conditions : les membres de l'entente doivent connaître le comportement des autres membres, il doit y avoir une coordination tacite inscrite dans la durée entre les membres, et la réaction des concurrents ne doit pas remettre en cause les résultats prévus de l'action commune. 	<p>L'article L 420-1 vise expressément les pratiques mises en œuvre "par une entreprise ou un groupe d'entreprises".</p> <p>Le groupe peut détenir une position dominante de manière :</p> <ul style="list-style-type: none"> - individuelle : s'il est envisagé comme une seule entité économique ; alors, la mère sera responsable en cas d'abus. - collective : s'il est envisagé comme la réunion de plusieurs sociétés ; alors les filiales pourront être responsables. 	<p>Détention individuelle¹¹⁵ : « <i>la circonstance que la filiale a une personnalité juridique distincte ne suffit pas pour écarter la possibilité que son comportement soit imputé à la société mère ; tel peut être le cas lorsque la filiale ne détermine pas de façon autonome son comportement sur le marché, mais applique pour l'essentiel les instructions qui lui sont imparties par la société</i> ».</p> <p>Plusieurs critères sont proposés pour retenir la détention individuelle¹¹⁶.</p> <p>La jurisprudence française reprend ce critère de l'autonomie de décision, et ajoute des critères économiques de participation au capital. Cf. décisions du Conseil de la Concurrence sur la Française des Jeux¹¹⁷ et sur TF1¹¹⁸</p> <p>Détention collective : chaque membre détenant cette position sera responsable d'un abus, si les entreprises en cause sont liées par des liens commerciaux¹¹⁹, contractuels¹²⁰ ou qui résultent du marché oligopolistique¹²¹.</p>
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¹¹² **article 82 TCE** : Est incompatible avec le marché commun et interdit, dans la mesure où le commerce entre États membres est susceptible d'en être affecté, le fait pour une ou plusieurs entreprises d'exploiter de façon abusive une position dominante sur le marché commun ou dans une partie substantielle de celui-ci.

Ces pratiques abusives peuvent notamment consister à :

- imposer de façon directe ou indirecte des prix d'achat ou de vente ou d'autres conditions de transaction non équitables;
- limiter la production, les débouchés ou le développement technique au préjudice des consommateurs;
- appliquer à l'égard de partenaires commerciaux des conditions inégales à des prestations équivalentes, en leur infligeant de ce fait un désavantage dans la concurrence;
- subordonner la conclusion de contrats à l'acceptation, par les partenaires, de prestations supplémentaires qui, par leur nature ou selon les usages commerciaux, n'ont pas de lien avec l'objet de ces contrats.

¹¹³ **Article L 420-2 code de commerce** : Est prohibée, dans les conditions prévues à l'article L. 420-1, l'exploitation abusive par une entreprise ou un groupe d'entreprises d'une position dominante sur le marché intérieur ou une partie substantielle de celui-ci. Ces abus peuvent notamment consister en refus de vente, en ventes liées ou en conditions de vente discriminatoires ainsi que dans la rupture de relations commerciales établies, au seul motif que le partenaire refuse de se soumettre à des conditions commerciales injustifiées.

Est en outre prohibée, dès lors qu'elle est susceptible d'affecter le fonctionnement ou la structure de la concurrence, l'exploitation abusive par une entreprise ou un groupe d'entreprises de l'état de dépendance économique dans lequel se trouve à son égard une entreprise cliente ou fournisseur. Ces abus peuvent notamment consister en refus de vente, en ventes liées, en pratiques discriminatoires visées au I de l'article L. 442-6 ou en accords de gamme.

¹¹⁴ TPICE Laurent Piau 26 janvier 2005.

¹¹⁵ Arrêt de la CJCE du 21 février 1973 Continental Can.

¹¹⁶ Pour apprécier la détention individuelle, la Commission Européenne, au point 78 des Lignes directrices de la Commission sur l'analyse du marché 2002/C 165/03, a proposé plusieurs critères 116 : la taille globale de l'entreprise, le contrôle d'une infrastructure qu'il n'est pas facile de dupliquer, les avancées ou la supériorité technologiques, l'absence ou la faible présence de contre-pouvoir des acheteurs, l'accès facile ou privilégié aux marchés des capitaux et aux ressources financières, la diversification des produits et/ou des services (par exemple, produits ou services groupés), les économies d'échelle, les économies de gamme, l'intégration verticale, l'existence d'un réseau de distribution et de vente très développé, l'absence de concurrence potentielle des entraves à l'expansion.

¹¹⁷ **Décision du 5 mars 2001 relative à des pratiques mises en œuvre par la société Française des Jeux dans les secteurs de la maintenance informatique et du mobilier de comptoir** : les sociétés saisissantes faisaient valoir que des pratiques de soutien, constitutives d'un abus de position dominante devaient être imputées à la société mère la Française des Jeux, et à sa filiale ayant bénéficié de ce soutien, la société Française de Maintenance. Le Conseil a relevé que cette filiale ne disposait d'aucune autonomie par rapport à sa société mère car celle-ci détenait 90 % de son capital, la filiale réalisait 60 % de son chiffre d'affaires avec elle, la plupart des dirigeants de la filiale exerçaient également des responsabilités au sein de la mère et la gestion de la filiale et la détermination de sa stratégie commerciale étaient étroitement contrôlées par la société mère.

¹¹⁸ Dans sa **Décision du 13 février 2001 relative à des pratiques constatées dans le secteur de la vente d'espaces publicitaires visuels, le Conseil a sanctionné la société TF1** en relevant que sa filiale, auteur des pratiques, ne disposait d'aucune autonomie juridique et d'action par rapport à sa société mère, était détenue à plus de 99 % par TF1 et que son Conseil d'administration était composé de dirigeants de la mère.

¹¹⁹ Arrêt du 7 octobre 1999, Irish Sugar du TPICE.

¹²⁰ CJCE 27 avril 1994, Commune d'Almelo, aff. C-393/92, Rec p 1477.

¹²¹ CJCE, 16 mars 2000, Compagnie Maritime Belge.

	<p>Article L 442-6-1¹²² du code de commerce français prohibe l'abus de dépendance économique.</p>	<ul style="list-style-type: none"> - une situation de dépendance économique, - une exploitation abusive de cette situation par le cocontractant, client ou fournisseur, - une affectation réelle ou potentielle du fonctionnement ou de la structure de la concurrence. 	<p>L'article vise expressément « l'exploitation abusive par une entreprise ou un groupe d'entreprises »</p>	<p><u>CA Versailles 15 janvier 2004, 2004-235274</u> : il n'y a pas de dépendance lorsqu'un partenaire s'oblige envers un seul co-contractant. Un sous-traitant ne peut invoquer un état de dépendance économique vis-à-vis de l'entrepreneur principal alors que, filiale d'un groupe de sociétés, sa société a été constituée pour exécuter le contrat de sous-traitance.</p>
	<p>Directive 2005/29/CE du 11 mai 2005 relative aux pratiques commerciales déloyales des entreprises vis-à-vis des consommateurs</p>	<p>L'article 2.f définit le code de conduite « un accord ou un ensemble de règles qui ne sont pas imposées par les dispositions législatives, réglementaires ou administratives d'un Etat membre et qui définissent le comportement des professionnels qui s'engagent à être liés par lui en ce qui concerne un ou plusieurs secteurs d'activité »</p> <p>L'article 6.2.b qualifie d'actions trompeuses « le non respect par le professionnel d'engagement contenus dans un code de conduite par lequel il s'est engagé à être lié, dès lors : que ces engagements ne sont pas de simples aspirations, mais sont fermes et vérifiables, et que le professionnel indique, dans le cadre d'une pratique commerciale, qu'il est lié par le code »</p>		<p>Le nouvel article L121-1 du Code de la Consommation français issu de la loi n°2008-3 du 3 janvier 2008 intègre expressément la violation par une entreprise des engagements exprimés dans son code de conduite. Selon les termes du nouvel article : « I. - Une pratique commerciale est trompeuse si elle est commise dans l'une des circonstances suivantes : 1° Lorsqu'elle crée une confusion avec un autre bien ou service, une marque, un nom commercial, ou un autre signe distinctif d'un concurrent ; 2° Lorsqu'elle repose sur des allégations, indications ou présentations fausses ou de nature à induire en erreur et portant sur l'un ou plusieurs des éléments suivants : (...) e) La portée des engagements de l'annonceur, la nature, le procédé ou le motif de la vente ou de la prestation de services. »</p>

¹²² Engage la responsabilité de son auteur et l'oblige à réparer le préjudice causé le fait, par tout producteur, commerçant, industriel ou personne immatriculée au répertoire des métiers :

1° De pratiquer, à l'égard d'un partenaire économique, ou d'obtenir de lui des prix, des délais de paiement, des conditions de vente ou des modalités de vente ou d'achat discriminatoires et non justifiés par des contreparties réelles en créant, de ce fait, pour ce partenaire, un désavantage ou un avantage dans la concurrence ;

2° a) D'obtenir ou de tenter d'obtenir d'un partenaire commercial un avantage quelconque ne correspondant à aucun service commercial effectivement rendu ou manifestement disproportionné au regard de la valeur du service rendu. Un tel avantage peut notamment consister en la participation, non justifiée par un intérêt commun et sans contrepartie proportionnée, au financement d'une opération d'animation commerciale, d'une acquisition ou d'un investissement, en particulier dans le cadre de la rénovation de magasins ou encore du rapprochement d'enseignes ou de centrales de référencement ou d'achat. Un tel avantage peut également consister en une globalisation artificielle des chiffres d'affaires ou en une demande d'alignement sur les conditions commerciales obtenues par d'autres clients ;

b) D'abuser de la relation de dépendance dans laquelle il tient un partenaire ou de sa puissance d'achat ou de vente en le soumettant à des conditions commerciales ou obligations injustifiées. Le fait de lier l'exposition à la vente de plus d'un produit à l'octroi d'un avantage quelconque constitue un abus de puissance de vente ou d'achat dès lors qu'il conduit à entraver l'accès des produits similaires aux points de vente ;

3° D'obtenir ou de tenter d'obtenir un avantage, condition préalable à la passation de commandes, sans l'assortir d'un engagement écrit sur un volume d'achat proportionné et, le cas échéant, d'un service demandé par le fournisseur et ayant fait l'objet d'un accord écrit ;

4° D'obtenir ou de tenter d'obtenir, sous la menace d'une rupture brutale totale ou partielle des relations commerciales, des prix, des délais de paiement, des modalités de vente ou des conditions de coopération commerciale manifestement dérogatoires aux conditions générales de vente ;

5° De rompre brutalement, même partiellement, une relation commerciale établie, sans préavis écrit tenant compte de la durée de la relation commerciale et respectant la durée minimale de préavis déterminée, en référence aux usages du commerce, par des accords interprofessionnels. Lorsque la relation commerciale porte sur la fourniture de produits sous marque de distributeur, la durée minimale de préavis est double de celle qui serait applicable si le produit n'était pas fourni sous marque de distributeur. A défaut de tels accords, des arrêtés du ministre chargé de l'économie peuvent, pour chaque catégorie de produits, fixer, en tenant compte des usages du commerce, un délai minimum de préavis et encadrer les conditions de rupture des relations commerciales, notamment en fonction de leur durée. Les dispositions qui précèdent ne font pas obstacle à la faculté de résiliation sans préavis, en cas d'inexécution par l'autre partie de ses obligations ou en cas de force majeure. Lorsque la rupture de la relation commerciale résulte d'une mise en concurrence par enchères à distance, la durée minimale de préavis est double de celle résultant de l'application des dispositions du présent alinéa dans les cas où la durée du préavis initial est de moins de six mois, et d'au moins un an dans les autres cas ;

6° De participer directement ou indirectement à la violation de l'interdiction de revente hors réseau faite au distributeur lié par un accord de distribution sélective ou exclusive exempté au titre des règles applicables du droit de la concurrence ;

7° De soumettre un partenaire à des conditions de règlement manifestement abusives, compte tenu des bonnes pratiques et usages commerciaux, et s'écartant au détriment du créancier, sans raison objective, du délai indiqué au huitième alinéa de l'article L. 441-6 ;

8° De procéder au refus ou retour de marchandises ou de déduire d'office du montant de la facture établie par le fournisseur les pénalités ou rabais correspondant au non-respect d'une date de livraison ou à la non-conformité des marchandises, lorsque la dette n'est pas certaine, liquide et exigible, sans même que le fournisseur n'ait été en mesure de contrôler la réalité du grief correspondant.

Tableau 3 – Législation française en matière de contrats de sous-traitance dans le domaine du bâtiment

Conditions d'engagement de la responsabilité du maître d'ouvrage pour des actions de son entrepreneur, par les sous-traitants				Type de responsabilité engagée
Vis-à-vis du contrat	Vis-à-vis du sous-traitant	Vis-à-vis de l'entrepreneur	Vis-à-vis du maître d'ouvrage	
Contrat général de sous-traitance au sens de loi n° 75-1334 du 31 décembre 1975, relative à la sous-traitance ¹²³ .	Il doit respecter la procédure prévue d'action directe contre le maître d'ouvrage ¹²⁴ , et invoquer un dommage .	Une faute de l'entrepreneur, qui ne respecte pas son obligation d'information du maître d'ouvrage ¹²⁵ et qui ne paie pas les sommes dues au sous-traitant dans le mois.	Une faute du maître d'ouvrage qui : <ul style="list-style-type: none"> - recourt à celui qui exerce le travail dissimulé¹²⁶ - n'a pas procédé aux vérifications obligatoires, alors que l'entrepreneur est verbalisé pour travail dissimulé.¹²⁷ - n'est pas intervenu pour faire cesser la situation, alors qu'il était informé par écrit de l'existence d'une situation de travail dissimulé chez un sous-traitant.¹²⁸ 	Le sous-traitant de 1 ^{er} rang bénéficie d'une action directe ¹²⁹ en recouvrement de ses créances, contre le maître d'ouvrage pour les sommes non payées par l'entrepreneur. En plus, le maître d'ouvrage peut être solidairement financièrement de l'entrepreneur, en cas de travail dissimulé (travail clandestin) et peut engager sa responsabilité pénale.
Contrat de sous-traitance en matière de travaux publics ou de bâtiments ¹³⁰	Idem	Idem	Une faute quasi-délictuelle ¹³¹ du maître d'ouvrage, qui ne respecte pas son devoir de vigilance ¹³²	En plus de l'action directe, le maître d'ouvrage peut engager sa responsabilité civile quasi-délictuelle.

¹²³ Art 1 : l'opération par laquelle un entrepreneur confie par un sous-traité, et sous sa responsabilité, à une autre personne appelée sous-traitant tout ou partie de l'exécution du contrat d'entreprise ou du marché public conclu avec le maître de l'ouvrage.

¹²⁴ Loi n° 75-1334 du 31 déc 1975. Art. 12 : Le sous-traitant a une action directe contre le maître de l'ouvrage si l'entrepreneur principal ne paie pas, un mois après en avoir été mis en demeure, les sommes qui sont dues en vertu du contrat de sous-traitance ; copie de cette mise en demeure est adressée au maître de l'ouvrage.

¹²⁵ Loi n° 75-1334 du 31 déc 1975. Art. 3 : l'entrepreneur doit, au moment de la conclusion et pendant toute la durée du contrat ou du marché, faire accepter chaque sous-traitant et agréer les conditions de paiement de chaque contrat de sous-traitance par le maître de l'ouvrage.

Art. 5 (tel que modifié par Loi MURCEF n°2001-1168 du 11 déc 2001) : l'entrepreneur principal doit, lors de la soumission, indiquer au maître de l'ouvrage la nature et le montant de chacune des prestations qu'il envisage de sous-traiter, ainsi que les sous-traitants auxquels il envisage de faire appel.

En cours d'exécution du marché, l'entrepreneur principal peut faire appel à de nouveaux sous-traitants, à la condition de les avoir déclarés préalablement au maître de l'ouvrage.

¹²⁶ Loi n° 91-1383 du 31 déc 1991 renforçant la lutte contre le travail clandestin (Section 2 du code du travail : travail dissimulé). Art L. 324-13-1 : Toute personne condamnée pour avoir recouru directement ou par personne interposée aux services de celui qui exerce un travail dissimulé est tenue solidairement avec ce dernier au paiement de ...

¹²⁷ Art. L324-14 : Toute personne qui ne s'est pas assurée, lors de la conclusion d'un contrat et tous les six mois ... que son cocontractant s'acquitte de ses obligations...sera tenue solidairement avec celui qui a fait l'objet d'un procès-verbal pour délit de travail dissimulé, au paiement de...

¹²⁸ Art. L 324-14-1 : Le maître de l'ouvrage...informé...de l'intervention d'un sous-traitant...en situation irrégulière...enjoint aussitôt par lettre recommandée avec demande d'avis de réception à la personne avec laquelle il a contracté de faire cesser sans délai la situation. A défaut, il est tenu solidairement avec son cocontractant au paiement des impôts, taxes, cotisations, rémunérations et charges...

¹²⁹ Loi n° 75-1334 du 31 déc 1975. Art. 12 : Le sous-traitant a une action directe contre le maître de l'ouvrage si l'entrepreneur principal ne paie pas, un mois après en avoir été mis en demeure, les sommes qui sont dues en vertu du contrat de sous-traitance ; copie de cette mise en demeure est adressée au maître de l'ouvrage.

¹³⁰ Au sens des art. L 241-1 et L.242-1 modifiés par la loi du 4 janvier 1978.

¹³¹ Civ. 3ème, 14 novembre 2001, Bull. n° 131, cassation au visa de l'article 1382 du Code civil, ensemble l'article 14-1 de la loi du 31 décembre 1975.

¹³² Art 14-1 Loi n° 75-1334 du 31 déc 1975 : Le maître de l'ouvrage doit, s'il a connaissance de la présence sur le chantier d'un sous-traitant n'ayant pas fait l'objet des obligations définies à l'article 3 (acceptation du sous-traitant par le maître de l'ouvrage et agrément de ses conditions de paiement) ou à l'article 6, ainsi que celles définies à l'article 5 (en cas de sous-traitance en cascade dans un marché public), mettre l'entrepreneur principal ou le sous-traitant en demeure de s'acquitter de ces obligations.