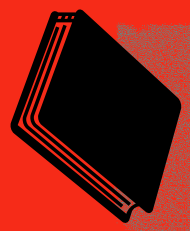
HANDBOOK OF PROPOSALS TO REGULATE MULTINATIONALS



*Sherpa

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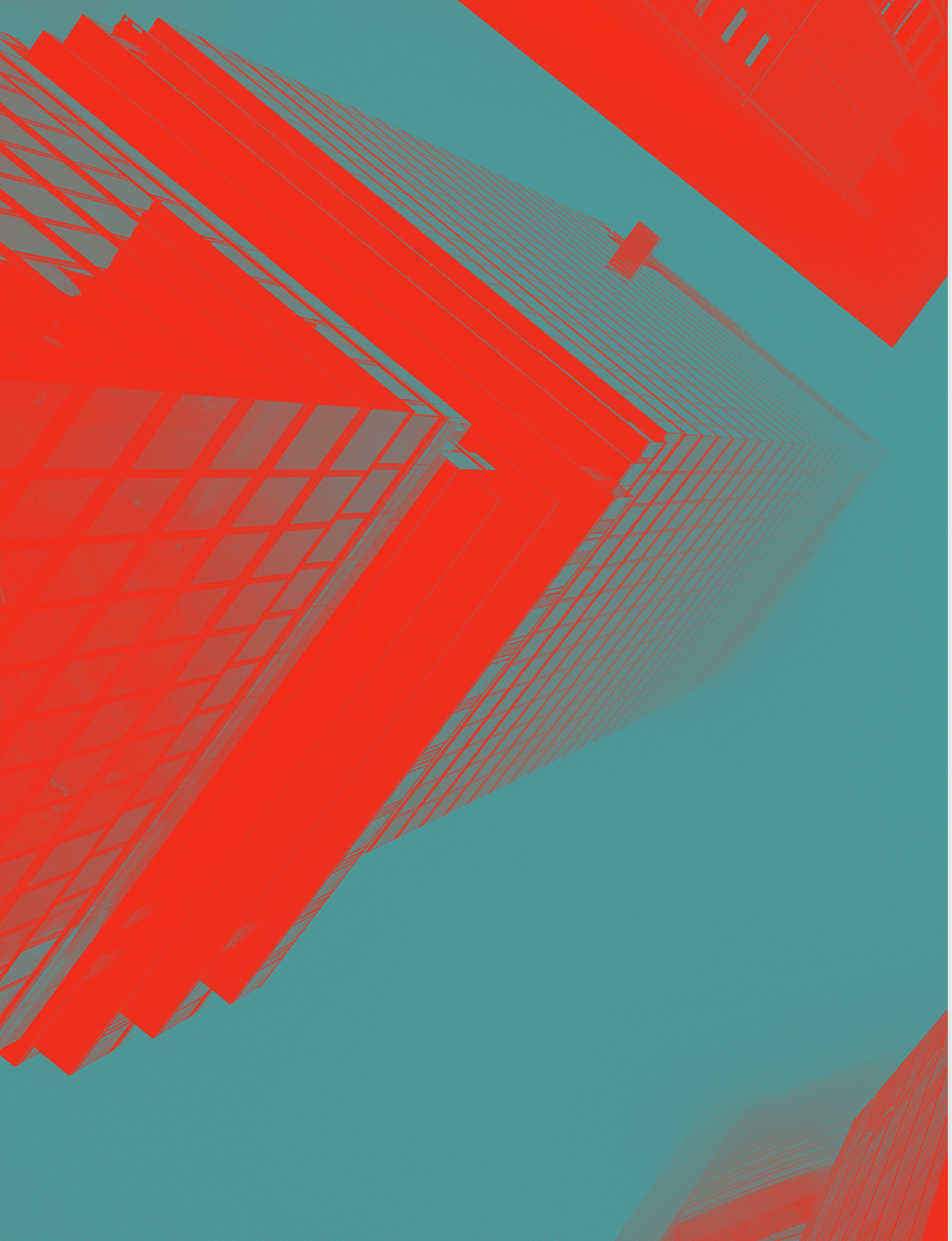
Published by Sherpa
December 2021

80 quai de Jemmapes, 75010 Paris
www.asso-sherpa.org

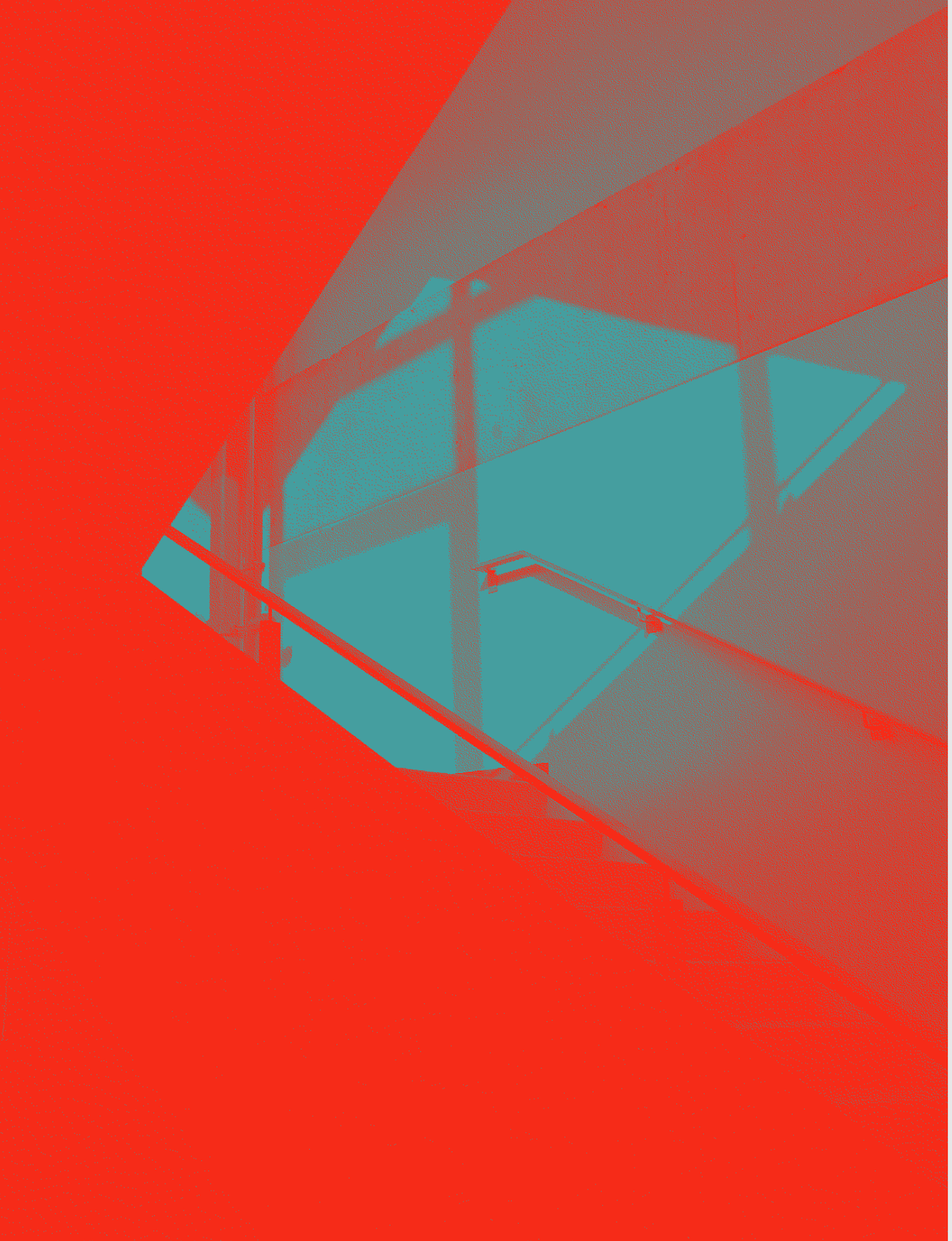


*Sherpa

Sherpa is a non-profit association, founded in 2001.
The organisation brings together a team of legal experts and advocates who use the law as a tool to combat the new forms of impunity linked to the Globalisation of economic and financial exchanges, and to defend victims of economic crimes.

As such, Sherpa has brought cases against multinational corporations for serious human rights and environmental violations in their global supply chains, as well as litigation against corporations for involvement in international corruption schemes.

The four pillars of Sherpa's work are strategic litigation, advocacy, legal research and capacity building activities, with the aim to significantly change the legal framework in France, at the European level and internationally.



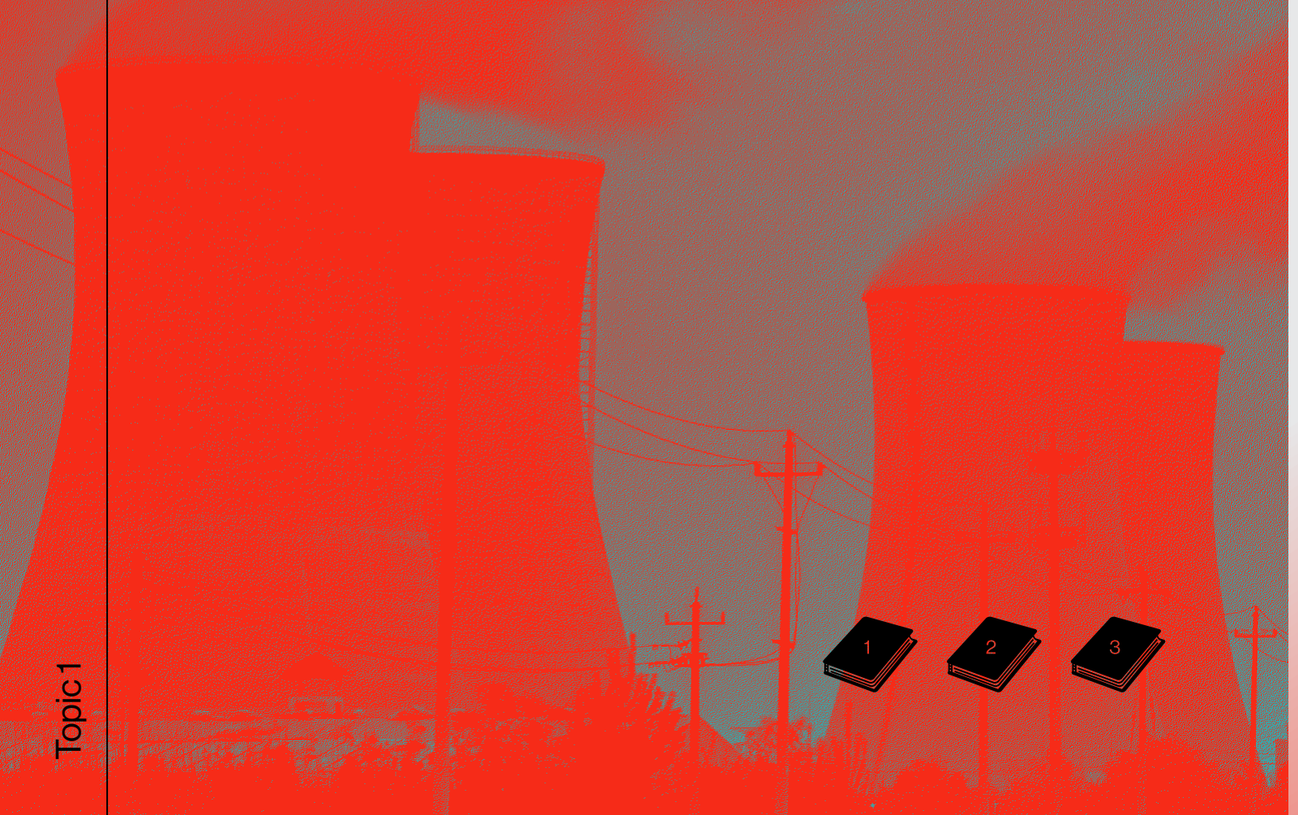
Sherpa was born out of a fundamental observation: the gap between the political, economic and social existence of multinational companies and their legal non-existence, which is a source of impunity in a globalised world. This conclusion led to the drafting of the first edition of Sherpa's handbook of proposals in 2010. The aim of the handbook was to highlight the obstacles to the regulation of multinationals and to formulate proposals to overcome them.

Some of these proposals have since been enacted into law. Perhaps most notably, the French parliament in 2017 adopted the law on the duty of vigilance, partly inspired by one of Sherpa's proposals. Other proposals regarding the specialisation of jurisdictions, the restitution of assets resulting from transnational corruption and the fight against tax and judicial havens have also made an impact on law makers.

However, other proposals from the original handbook have not stood the test of time. In recent years, Sherpa's ongoing advocacy efforts, particularly in litigation, have helped identify the limitations of certain proposals. The emphasis placed at the time on reporting on social and environmental impacts has not proven to reduce information asymmetries between multinationals and citizens, a condition *sine qua non* for access to justice. In addition, the self-regulation or co-regulation of corporate behaviour have been shown to yield little success.

This new version of the Handbook is intended to reflect these insights, as well as Sherpa's most recent advocacy efforts. Far from aiming to be exhaustive, the Handbook identifies ongoing and emerging challenges in the fight against the impunity of multinationals. It looks back at the progress made over the last decade and draws lessons for the future, from a resolutely committed perspective.

STRENGTHENING CORPORATE ACCOUNTABILITY



Topic 1

The multinational corporation is an undeniable economic, political and social reality. However, there is no legal definition of the “enterprise”, the “group”, or the “multinational”. Generally, only individual companies are legally defined, and endowed with legal personality. Principles of legal separation of corporate entities and limited liability also shield each company composing a multinational corporate group from the potential legal consequences of the other group members’ actions[2].

In this legal landscape, mulitnationals can act with impunity. They have strong incentives to relocate their activities abroad, where they take advantage of potentially less stringent social, environmental, and tax regulation.

Complex corporate structures prevent the coherent attribution of liability within international groups, especially when multinationals undermine the environment or violate human rights. Subcontracting and outsourcing arrangements generate further legal obstacles to corporate accountability.

Thus, despite a number of positive developments in civil and criminal law, many challenges still remain to holding multinationals accountable for environmental and human rights abuse in their global supply chains.

OBLIGATIONS AND ACCOUNTABILITY OF PARENT AND INSTRUCTING COMPANIES

The multinational corporate group is a group of companies, each with their own legal personality, that operates in multiple countries, and maintains varying legal relationships between each member. Generally, a parent company, "exercises control, defines policy and may even imposes its decisions on the others"[5].

Nonetheless, **the group as a whole is not legally defined,** and the parent company remains largely shielded from the legal consequences of activities carried out abroad through its subsidiaries. Indeed, the legislatures and the courts only admit the existence of the group and the parent company's liability in an exceptional, indirect and fragmented manner[4].

Moreover, even in the rare instances in which the group and parent company are acknowledged, the law generally fails to take into account many companies within multinationals' value chains, including their direct and indirect suppliers and subcontractors.

Indeed, corporations outsource production and services within their international supply and subcontracting chains to avoid liability. Under these contractual arrangements, contractors at the end of the supply chain generally bear the burden for social and environmental damages.

Thus, the legal landscape of the globalised economy has allowed corporations to derive profits from the gaps in social and environmental protection between countries, and even sometimes from serious violations of international law.

Efforts to end this corporate impunity have been stymied by calls for self-regulation and the development of a so-called "soft law", lacking any legally binding character (codes of conduct, ethical charts, private standards). The limits of such systems have been widely denounced [5].

DEVELOPMENTS SINCE 2010

The first edition of Sherpa's handbook made similar observations and called for the creation of legally binding mechanisms to hold corporations accountable.

As a preliminary step, the handbook advocated for a definition of the corporation that factored in the public interest, the recognition of the concept of the corporate group and the adoption of a common definition for the parent company[6].

Numerous proposals were also made to strengthen transparency tools at national and international levels, including reporting obligations on the environmental, social and governance impacts of multinationals[7].

These measures were aimed in particular at "encouraging self-discipline", "moving beyond "all talk no action" " and guaranteeing third parties' access to justice on the basis of information published by companies[8].

In the 2000s, the debate around multinational corporate accountability indeed took a legislative turn, in particular with the reinforcement of non-financing reporting obligations[9].

Furthermore, French parliament moved to amend Articles 1832 et seq. of the French Civil Code on the company[10], as part of the debate on the PACTE law[11]. **However, the PACTE law, which was ultimately adopted in 2019,** had little impact. The law only marginally rephrased Article 1833 of the Civil Code on corporate interest[12], granted companies the option to declare a rather nebulous "raison d'être"[13] , and established the concept of "enterprise à mission", which enables economic actors to officially adopt certain values[14].

These legal mechanisms are mainly cosmetic, and have been widely denounced as ineffective. Just as soft legal instruments, they provide new communication tools for companies[15]. They do not address the obstacles to corporate accountability for human rights or environmental abuses. In particular, they have not provided better access to information on multinationals.

In addition, the first version of the handbook called for the recognition of the parent company's liability for actions undertaken by overseas subsidiaries, as well as for increased accountability with respect to its supply chains[16].

To this end, various **due diligence and vigilance** obligations have been progressively established in order to hold parent companies accountable with respect to their subsidiaries and supply chains[17].

However, these new obligations are highly heterogeneous and questionable in several respects. Most notably, these measures do not provide a definition of the parent company nor establish consistent standards to identify multinational groups and their supply chains. Moreover, they are not applicable to all companies and rarely cover the entire value chain[18].

These provisions also seemingly endorse self-regulatory processes (code of conduct, ethical commitments, etc.) or market-based regulation (audits, certifications), the limitations of which spurred the adoption of binding legislations in the first place[19].

These obligations are indeed more often focused on compliance than on concrete harm prevention. Thus, a company's lack of vigilance does not necessarily stem from committing, contributing to or benefiting from human rights or environmental violations, but instead lies in a company's the failure to adopt internal processes to prevent such violations.

For instance, regarding the duty of vigilance on human rights and the environment[20], the law is not yet applicable to all companies[21]. Moreover, the text indirectly identifies the group over which vigilance must be exercised by referring solely to the concept of exclusive control[22]. Thus, minority-owned companies, over which a parent company only exercises influence or joint control, fall outside a parent company's of obligation of vigilance. With regard to the parent company's ties to subcontractors, the legislature has chosen to refer to the notion of "established commercial relations" ("*relations commerciales établies*"), which has yet to be interpreted in the context of the law to ensure that it captures the full extent of the value chain.

Furthermore, the definition of the duty of vigilance by reference to the establishment and implementation of a vigilance plan has led some companies to view it as merely a reporting obligation rather than a general obligation of prudent and diligent behaviour.

Additionally, although the law on the duty of vigilance of parent and instructing companies has the merit of creating, in an unprecedented way, the liability conditions for the companies it targets, in practice those conditions face several limits. A major pitfall is the law's reference to the general fault-based civil liability regime under Articles 1240 and 1241 of the French Civil Code. Under this standard, in order to establish civil liability a plaintiff must prove the causal link between a parent company's lack of vigilance and the harm caused[23].

This requirement is inconsistent with the objective of fighting impunity and ensuring access to justice in the context of environmental or human rights abuses, as the relevant information to establish liability in such cases is largely held by the companies themselves. Moreover, parent companies create separation, or at least the appearance of separation, between themselves and environmental and human rights abuses through the interposition of corporate entities and subcontracts, precisely designed to obscure the causal link of their actions.

Proposal n°1 | Create and strengthen parent and instructing companies' obligations and civil liability regime towards groups and supply chains

While the gradual establishment of vigilance obligations reflects the growing need to fight abuses committed by multinationals, these obligations must be strengthened in order to create a comprehensive liability regime within groups.

One first step in this direction, already mentioned in the first version of Sherpa's handbook of proposals, would be the adoption of a clear definition of the parent company and its value chain. Such a definition would make it possible to more consistently identify companies subject to vigilance obligations and the scope of these obligations within the corporate group, including its supply chain. The definition of parent company should be broad enough to cover the corporate group beyond the sole notion of control and include customers, subcontractors and supply chains.

Furthermore, in order to overcome the misperception that these laws are merely reporting requirements, vigilance obligations must be clearly redefined as legally binding obligations of prudent and diligent conduct.

Specifically, the duty of vigilance should be defined as a general obligation for parent and instructing companies to take all necessary and adequate measures to ensure that they do not profit from environmental or human rights abuses. Under this definition, the occurence of human rights or environmental abuses in a company's value chain would characterize profit.

A comprehensive liability regime for parent companies must also take into account the potential risks generated by certain activities relative to their potential benefits.

Recent developments in various areas of law and proposals for civil liability reform have tended towards the establishment of strict liability and presumptions of fault. For example, these standards have been applied to the liability of the employers for acts committed by employees, the liability for the actions of things and other special liability regimes. These regimes could offer more adapted solutions for victims' access to justice in the context of globalisation, particularly with regard to the burden of proof.

Based on this model, a parent company's strict, vicarious liability for social and environmental harm caused by group entities, broadly defined, could be envisaged. For environmental and human rights abuses caused within the subcontracting or supply chain, parent companies should be held liable unless they can prove that they have taken all appropriate measures to prevent such harms from occurring in their subcontracting or supply chain[24].

CRIMINAL LIABILITY OF PARENT COMPANIES AND CONTRACTORS

Growing awareness of the potentially criminogenic nature of economic activity[25] has led to the gradual criminalisation of many business-related offences and the introduction into French law of corporate criminal liability[26].

Nonetheless, there are several limits to the enforcement of these laws in the context of multinationals' activities. First, criminal liability remains subject to the principle of personal liability and to the existence of legal personality, **thus exempting corporate groups from such liability**[27].

In addition, corporate restructuring can dissolve the various legal persons within the group thus making it difficult to hold them criminally liable. In accordance with recent developments in European law, the Court of Cassation (France's Supreme Court) now holds that in the event of a merger the acquiring company may be held criminally liable for acts committed by the acquired company prior to the merger. However, there are still several limits to the Court's holding[28].

Furthermore, the criminal liability of legal entities remains to some extent linked to that of individuals. A legal person can be held criminally liable if it can be established that an offence has been committed on its behalf by its organs or representatives[29]. However, the case law regarding the identification of the organ or representative who committed an offense has been inconsistent, particularly when parent companies are facing criminal liability for offences committed through their subsidiaries[30]. Thus relying on this principle to identify the organ or representative at fault raises many issues, especially given that in corporate groups activities are scattered between several legal entities and persons.

Moreover, we are witnessing a growing trend in corporate law towards 'decriminalisation'[31]. Specifically, the introduction of due diligence standards, which are often limited to the implementation of internal processes by companies, may paradoxically create a system of preventive sanctions and provide an escape route to avoid criminal liability. The advent of "negotiated justice", which allows legal persons to negotiate out of criminal liability with prosecutors is part of this worrying trend[32].

Anti-corruption law provides an alarming illustration of this trend. Under French law, managers are required to "take measures to prevent and detect the perpetration, in France or abroad, of acts of corruption or influence peddling"[33]. The law thus sanctions the failure to put in place anti-corruption measures. However, this approach prioritizes the prevention of corruption over liability for actual instances of corruption. It allows companies to use the implementation of preventive measures as a defence to liability in the event of an offence[34]. In addition, the French legislature has created the **'Convention Judiciaire d'Intérêt Privé' (CJIP),** which allows legal persons involved in corruption cases to avoid a guilty verdict and negotiate their sentence[35].

As part of its constitutional review of the duty of vigilance law on environmental and human rights matters, France's Constitutional Council repealed the fines initially provided in the event of a violation of the duty of vigilance[36]. The mechanism is therefore stripped of its punitive consequences.

Criminal penalties related to environmental violations, are based on administrative rules and scattered across environmental offences in numerous codes. This jumbled legal landscape results in a *"de facto* decriminalisation of environmental law"[37]. The legislature has also recently created a CJIP for environmental offences.

One can therefore question the effectiveness of these measures in fighting against the impunity of multinationals[38]. As one author concludes after analysing the phenomenon of decriminalisation in the corporate world, "Prevention remains an ideal, thus punishment is realistic[39]" .

Proposal n°2

Facilitate the criminal liability of legal persons and strengthen the arsenal of penalties for human rights, environmental and ethical violations perpetrated by economic actors

In order to better tackle the potential criminal conduct of economic actors in a globalised world, it is key to strengthen corporate criminal liability. Holding a parent company criminally liable, including for offences committed via its foreign subsidiaries, should be facilitated. This will require, among other things, reconsidering the requirement of identifying the body or representative who committed the offence on behalf of a parent company. The criminal liability of parent companies, as perpetrators or accomplices, could be based on the lack of vigilance within the corporate group or the supply chain[40].

The legal tools currently available should be strengthened to facilitate the prosecution of specific offences committed in the context of a corporation's globalized activities. These tools should also be adapted to take into consideration the opacity of supply chains.

The first version of the handbook suggested clarifying the crime of concealment[41]. As is the case with the crime of money laundering, the legislature could embed the autonomous nature of the crime of concealment by establishing a presumption of unlawfulness of the goods or products steming from the original offence, when certain conditions are satisfied[42].

The first handbook suggested requiring companies to account for the value of natural resources used in the production of goods and services, as well as companies' contribution to the enjoyment of fundamental rights. These accounting obligations for previously considered non-financial transactions, would enable the prosecution of companies that falsely report their environmental and social impacts[43].

The legal arsenalo against corruption should also be strengthened. It is particularly important to prevent a "compliance approach" to anti-corruption laws, and to instead facilitate a judicial treatment of cases. A first step to achieve more vigorous enforcement could be to introduce binding reporting mechanisms to the public prosecutor's office for internal control entities, accompanied with criminal liability for non-compliance.

The CJIP ('Convention Judiciaire d'Intérêt Privé') procedure which currently allows companies to negotiate their penalties, should be abolished.

With regard to environmental offences, the criminal arsenal should also be strengthened. Creating autonomous environmental offences (general offences of damaging the environment and endangerment of the environment, or even ecocide) would update the law to reflect the value society now attaches to the protection of the environment. These laws should also apply extraterritorially.

Lastly, as regards to human trafficking offences, existing laws could be strengthened to better address trafficking for economic exploitation[44].

Furthermore, considering that the activities of multinational companies are inherently opaque and complex, the 12-year statute of limitations introduced in 2017 for hidden or concealed offences must be abolished[45].

Finally, strengthening the legal arsenal requires adopting stronger sanctions as a deterrent, such as higher fines for legal persons and disgorgement mechanisms to confiscate profits made from the commission of offences.

INTERMEDIARIES' RESPONSIBILITY

Many actors play a key role as intermediaries of global economic and financial activity. These actors include accounting firms; social and environmental auditing firms; consultancy firms, particularly legal and tax consultancy firms; and business lawyers.

At the intersection of economic activity and the regulation of such activities, these actors can **facilitate the commission or concealment of corruption offences or serious environmental and human rights violations**. They also serve as experts or advisors to policy makers, creating a significant risk for conflict of interests in matters related to the business activity of their clients[46].

Recently, the "Pandora Leaks" demonstrated how banks, accounting firms, tax advisors, asset managers and lawyers have set up extensive systems of shell companies in tax and legal havens[47]. These complex arrangements can provide the financial infrastructure for money laundering or tax evasion. The offshore structures that facilitate the international circulation of illicit financial flows could not exist without these various **intermediaries and professionals**[48].

Such scandals reveal the limits of the anti-money laundering provisions, which in principle require these professionals monitor their clients and their funds[49]. Some facilitators, however, escape the application of the system, which also has major shortcomings[50].

At the core of this obligation is a responsibility to identify the clients and beneficial owners of financial transactions[51]. In addition, intermediaries must file a "suspicious transaction report" with Tracfin[52] when they know or suspect that funds have been obtained through the commission of offences[53]. After recieving a report of suspicion, Tracfin may formally object to a transaction.

Nevertheless, the transaction can be executed if no objection has been served or if, at the end of a ten-day period, no decision by the President of the Paris judicial court has been received by the author of the report extending the deadline or ordering the provisional sequestration of the funds, accounts or securities concerned in the report. Professionals may not be held criminally liable for handling stolen goods, money laundering or financing terrorism once they have properly filed a suspicious transaction report[54].

Given the increasing volume and frequency of financial transactions, such a system grants immunity to the very actors that the legislation was intended to regulate. Professionals are now encouraged to systematically report transactions in order to pursue their actvities, as they are fully aware that they will not be held liable[55].

In addition to financial audits and asset management activities, the emphasis on compliance mechanisms within international value chains has also created **lucrative business opportunities for facilitators. These professionals conduct environmental and social responsibility audits,** advise companies on the implementation of internal risk management processes, and even certify these processes based on unambitious private standards[56].

The shortcomings of these practices have been widely reported[57]. The Rana Plaza facilities in Bangladesh, which housed the subcontractors of several textile giants, were audited shortly before the building collapsed, killing over a thousand people[58]. It would thus seem appropriate to question the role of these actors in the regulation of global supply chains.

Proposal n°3

Strengthen the obligations and liability of social and environmental auditors and the various financial, legal and fiscal intermediaries who facilitate the concealment of economic crimes committed by multinationals

In order to combat money laundering, the scope *ratione personae* of the provisions should be extended to cover the role played by a wide range of intermediaries in the international laundering of the proceeds of crime.

The "suspicious transaction report" mechanism should also be amended to ensure Tracfin's objections are more systematic, and to prohibit further transactions in the absence of a favourable decision. The immunity now extended to professionals who simply file a suspicious transaction report should also be eliminated. In addition, the failure to report suspicious activity should be subject to more severe sanctions.

Reporting requirements for aggressive tax schemes, penalties for failure to report, and sanctions for advising or assisting in the creation or use of such schemes should be strengthened[59].

With regard to the responsibility of auditors and other private certification bodies in social and environmental matters, it is necessary to move away from the compliance-based approach, which creates incentives for oversight dictated by and for the private sector. Auditing and certification practices alone are not sufficient to fulfil a mulitnational's obligations with regard to its supply chains and subcontractors.

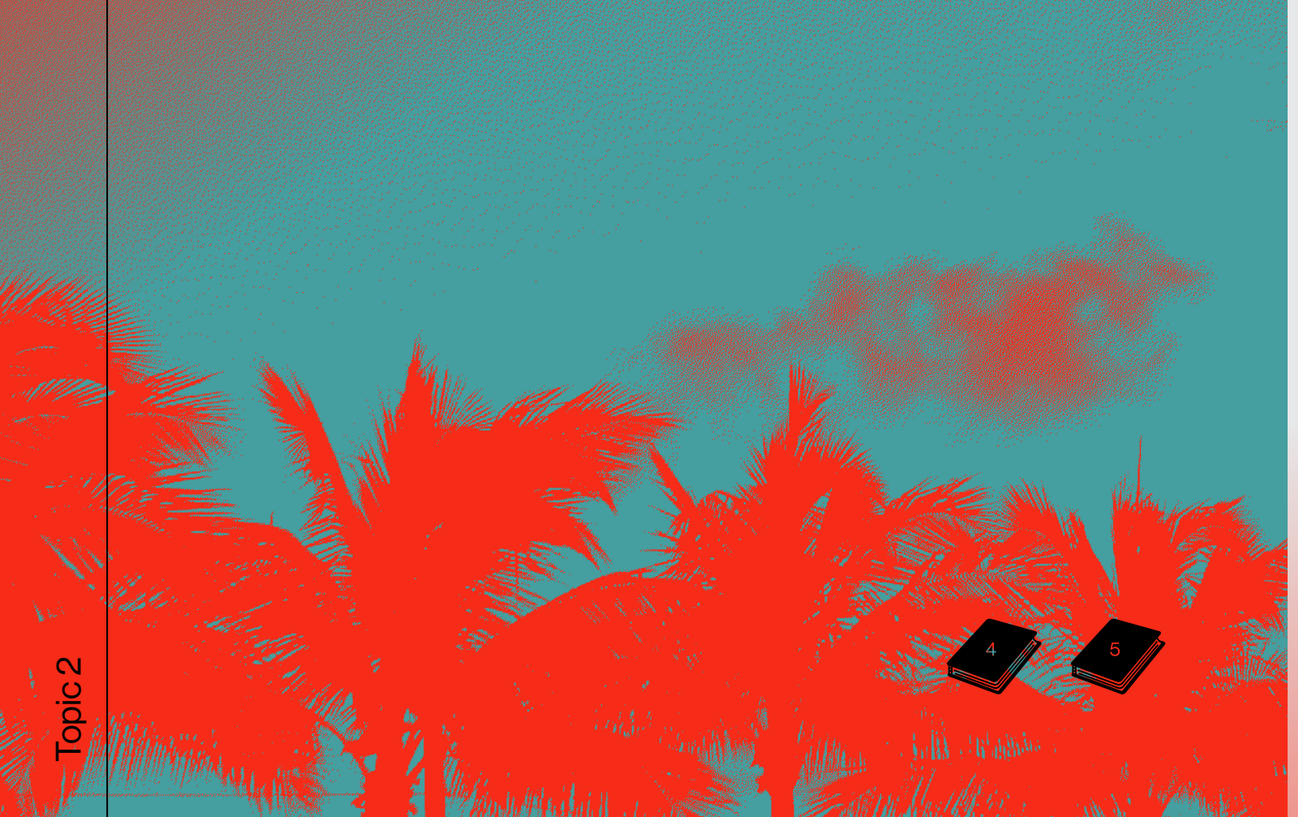
These actors must also be held accountable. Companies providing such services should be subject to social and environmental due diligence requirements and liability regimes ensuring access to justice for victims.

Contract clauses that prevent access to information, particularly for employees, on audits and their results should be prohibited[60].

It should be made easier to establish the criminal liability of these various intermediaries as accomplices or co-perpetrators of offences committed by their clients and from which they benefit. Confidentiality protections should not be allowed to create an insurmountable obstacle to accountability[61].

Moreover, it would be possible to enshrine and strengthen the obligations of independence and incompatibility for these various professionals, in order to prevent and limit the situations of conflict of interest that concern them[62].

PREVENT RESOURCE GRABBING BY MULTINATIONALS



Topic 2

Multinationals have benefited, with the consent of states, from a lack of regulation of their transnational activities to accumulate both financial and natural resources. This accumulation of resources has been at the expense of populations and states, whose capacity to create and maintain effective public services has been progressively eroded[63].

This hoarding of resources has been facilitated by the existence of tax and legal havens. These havens provide a number of services to economic actors, such as banking and tax secrecy, which allow them to conceal the origin or destination of illicit financial flows, such as those generated by corruption, and to bypass tax legislation or legislation aimed at protecting the environment and human rights.

Their continued existence severely undermines the capacity of states to protect tax revenues, which are the necessary counterpart to the exploitation of resources and an essential factor in the implementation of public policies for the protection of fundamental rights and the environment[64].

Moreover, public debt, developed in part to compensate for the erosion of the tax base in the globalised economy, is now especially vulnerable to the economic predation of vulture funds, thereby increasing the pressure on the financial resources of governments[65].

It is imperative to prevent these forms of resource grabbing. It is also necessary to guarantee that states and populations are effectively compensated for funds that may have been illegally misappropriated through these arrangements.

TAX AND LEGAL HAVENS

Tax and judicial havens provide individuals and companies with many services, such as **banking secrecy, tax secrecy, an easier process of company creation and, more generally, opacity** linked to the non-cooperative nature of these jurisdictions[66]. Some tax and judicial havens are known for hosting industries with high technological potential, others because they offer favourable rules for the registration of ships[67].

Such jurisdictions are more commonly used to evade tax, environmental or social rules, in a more or less legal manner. Individuals and companies use tax havens to guarantee their impunity by concealing their identity from the tax and judicial authorities of their country of origin[68].

In fact, incorporating companies in these states is designed to artificially locate an economic activity outside the territory where it is actually taking place[69]. Thus, this also allows multinationals to **artificially relocate their profits** to tax havens. These tax evasion strategies are expanding at an alarming rate with the development of the digital economy. The dematerialised nature of the digital economy facilitates the dissociation of production and sale and therefore the artificial transfer of profits[70].

Due to their opacity and uncooperative nature, tax and judicial havens are also the preferred jurisdictions for **laundering the proceeds of criminal activities** or concealing the sources of funds. These havens thus encourage criminal activity that undermines the rule of law, especially as such crimes often involve the misappropriation of public funds and corruption linked to resource exploitations[71].

The use of these jurisdictions is thus inherently linked to the evaporation of state resources and the accumulation of state resources by certain economic actors. Their use widens inequalities. These havens put a strain on the public services of countries whose resources are exploited without compensation. Due to the complexity of offshore arrangements, which rely on the expensive services of legal and accounting professionals, tax evasion is also a **privilege of the super-rich**[72].

While it is difficult to accurately assess the loss of revenue resulting from the use of these tax havens due to their opaque nature, the scandals linked to their use shed light on the extent of the phenomenon[73].

Requiring multinationals to publish detailed country-by-country reporting on their activities in all countries of operation would help to expose profit transfers to tax havens[74].

DEVELOPMENTS SINCE 2010

The first edition of Sherpa's handbook recommended integrating a country-by-country reporting requirement into international accounting standards, starting with the European Union. Despite some progress, the system has not yet been completed.

Since 2013, all French banks have been required to produce country-by-country reports on their subsidiaries and activities, profits, revenues, number of employees, taxes paid and public subsidies received[76]. This reporting as highlighted the disconnect between profits reported in tax havens and the banks' actual activity, suggesting a potential misuse of these jurisdictions to avoid tax laws or other regulatory obligations[77].

In 2015, France introduced a country-by-country declaration of economic, accounting, and tax results, which must be filed electronically by certain companies, to combat tax optimisation and tax evasion[78]. The information included in the country-by-country declaration is transmitted to the partner states with at least one entity within their jurisdiction. In 2016, the French legislature had planned to make these country-by-country reporting results public, but the Constitutional Council dismissed this proposal citing respect for the freedom of enterprise[79].

These reporting requirements are insufficient. The requirements do not apply to all groups and the information remains confidential, as it can only be shared between tax administrations. **This confidentiality undermines the very principle of reporting as an instrument of dissuasion.**

The European Council and Parliament announced on June 1, 2021 that they had reached an agreement on a directive on tax transparency for multinationals, but the deal negotiated between the European institutions limits the geographic scope of reporting: companies will only have to report on their activities in EU Member States and countries on the European list of tax havens, a list from which the main tax havens remain absent.

The current standards do not require disclosure of detailed transactions between subsidiaries , which still allows for the relocation of profits through the practice of transfer pricing.

Moreover, the fight against tax and legal havens and, in particular, money laundering is generally hindered by the non-cooperative nature of these jurisdictions and the opacity of shell companies set up there.[80] Therefore, increasing the transparency of the beneficiaries of shell companies appears to be another essential element in the fight against the impunity of economic actors.

DEVELOPMENTS SINCE 2010

The first edition of Sherpa's handbook suggested removing the anonymity of beneficiaries of tax havens by creating a European and then global register of legal business entities and trusts, which would make it possible to identify their real beneficiaries and owners[81].

A number of legislative changes in France and at European level have made it possible to move towards establishing such registers. The 5th Anti-Money Laundering Directive, which was transposed into French law at the beginning of 2020[82], has strengthened the procedures established in France in 2017 for maintaining the records of beneficial owners[83]. It widened the scope of entities subject to the obligation to report information on beneficial owners and made some of the information provided publicly available and free of charge[84].

However, these provisions do not overcome the difficulties related to the existence of opaque jurisdictions located outside the European Union. Indeed, companies registered outside the EU are not subject to the obligation to declare their beneficial owners. It therefore only takes a complex financial scheme to include a company registered in a third country's tax haven or jurisdiction to lose track of the beneficial owner.

Furthermore, the implementation of the registers is currently haphazard within each Member State. Recent statistics also show that reporting entities do not fully comply with the reporting requirements[85]. Finally, not all of the information declared by trusts and fiduciaries is accessible to the public[86].

Proposal n°4

Fight tax evasion by imposing ambitious public country-by-country reporting on multinationals and establishing public registers of beneficial owners of companies and trusts in an open format

Country-by-country reporting must be implemented ambitiously. In particular, scope of reporting should be broadened, without loopholes such as thresholds and safeguard clauses and reporting should be made public[87]. Since a single subsidiary can enable tax evasion, it is essential that public reporting covers all countries in order to analyse artificial profit transfers between subsidiaries. Reporting must include at least the following information for all countries where multinationals operate: lists of subsidiaries, profits, revenues, taxes paid, number of employees, grants, assets, sales and purchases.

Transparency on beneficial owners should also be improved through a more extensive definition of beneficial owners and extending reporting requirements, for example, to foreign entities with assets in the EU. Sanctions for failure to declare, as well as incomplete or inaccurate declarations should also be strengthened[88].

It is also worth **questioning the effectiveness of transparency as an instrument for deterring** tax behaviour if the recipients of the information are not equipped to review and process it, and even more so when the behavior disclosed remains perfectly legal.[89].

Other measures should make it possible to punish more severely companies that use tax havens and intermediaries who facilitate the implementation of such arrangements by expanding the criteria for the abuse of rights and tax fraud to include all forms of aggressive practices. More systematic punishment for the use of tax and judicial havens is also necessary. Commercial and financial sanctions could be envisaged to prevent the use of shell companies.

RESTITUTION OF STOLEN ASSETS

In addition to the evasion of state resources via tax havens, the restitution of funds illegally placed abroad to their countries of origin is crucial. **The restitution of "ill-gotten gains" is at the heart of this fight**[90].

Like other countries such as Switzerland, France has hosted some of these assets, which often stem from corruption of foreign public officials. Indeed, the globalisation of trade and the money laundering solutions offered by tax havens have allowed the accumulation of significant wealth through the embezzlement of public money by foreign leaders.

Thus, since its founding, Sherpa has initiated numerous legal proceedings to seize and freeze such assets in France, with the hope of securing the return of these assets to the countries affected [91].

While these proceedings have led to the confiscation of some assets by the French government, the legislature has not created mechanisms to ensure their return to the country of origin. Normally, when French courts issue judgments of conviction, they also rule on what happens to any assets seized during the proceedings by ordering their confiscation and restitution. But in the context of corruption and transnational money laundering, the legal framework is insufficient. If money is returned, the future of those funds depends **on the will of the leaders of the victim states,** a even though they themselves may be implicated in corruption cases[92]. There is no guarantee that the funds will not fall back into corruption channels or that they will benefit citizens.

DEVELOPMENTS SINCE 2010

The first edition of Sherpa's handbook recommended the adoption of an international Convention establishing a universal mechanism for the recovery and restitution of stolen assets. This Convention would aim to create an ad hoc international bank whose mission would be "to receive all funds of fraudulent origin apprehended abroad and claimed by certain States" and "to ensure, depending on the situation of these creditor States, that these funds are effectively made available to the populations concerned". This bank would be placed under the control of a committee composed of representatives of NGOs and citizens' associations from the countries concerned[93].

Over the last ten years, civil society proposals have developed the main principles of any restitution process and call for the adoption of regulatory and legislative mechanisms in France and internationally[94].

At the heart of these proposals is an obligation on the part of **states hosting stolen assets to return the assets even without an official request from the State of origin, transparency guarantees** on the repatriation and allocation of the funds, and the **participation of civil society**.

These various proposals led to the creation of a general legislative framework in 2021 recognising the principle of asset restitution[95]. A new law provided for the creation of a dedicated budget line to hold the funds and isolate them from the rest of the state budget, and already imposes the main lines and principles of restitution.

Proposal n°5 | Ensure the restitution of stolen assets through the establishment of a transparent and independent mechanism focused on identifying victims of corruption

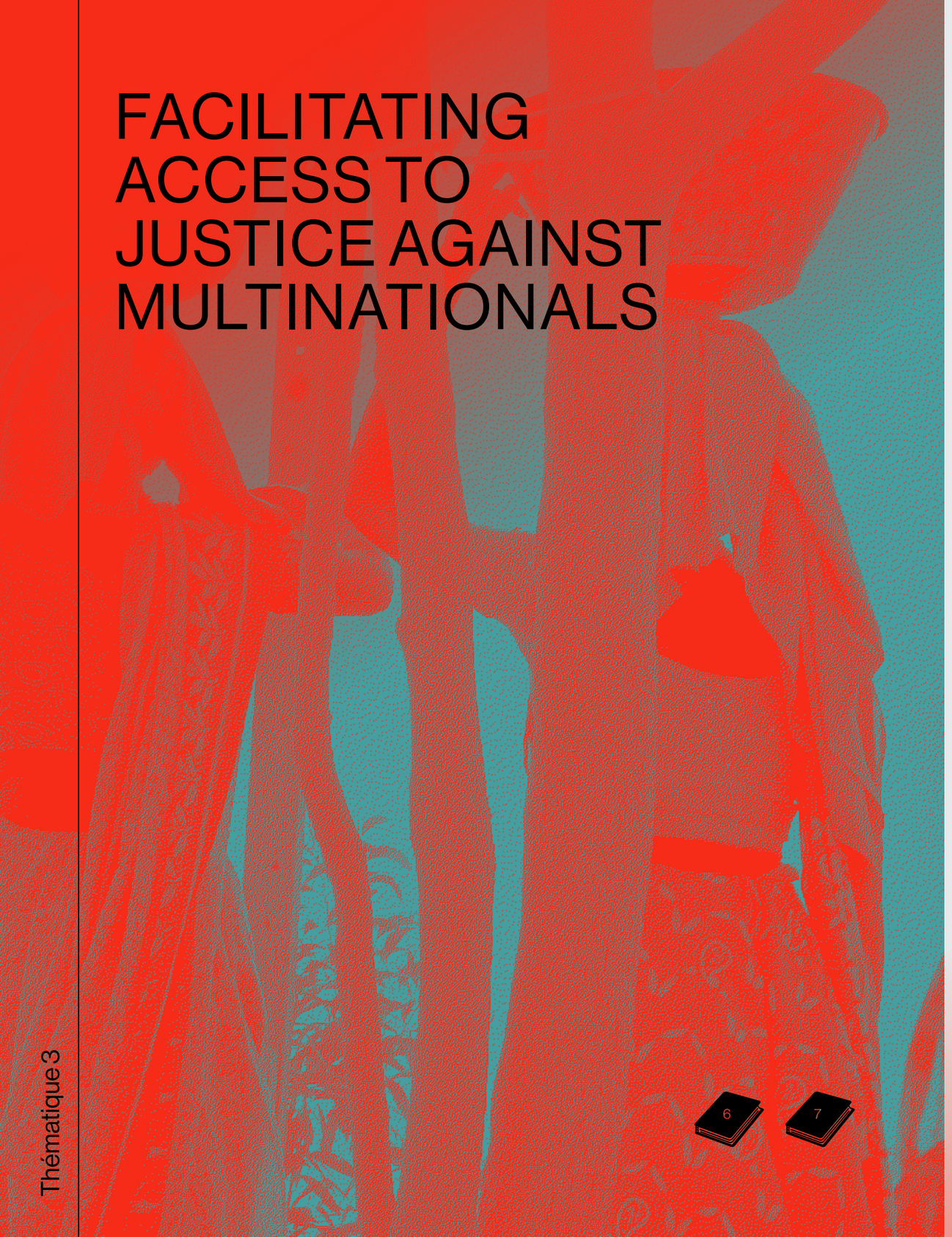
The adoption of this general framework for restitution is a welcomed first step. However, it is only a general framework and must be further elaborated in order to have real practical effect.

In order to ensure the restitution of assets, the creation of an ad hoc restitution mechanism for each ill-gotten gains case is necessary, through a bi-lateral dialogue between the receiving State and the restitution State. This mechanism will necessarily have to involve civil society in the state of restitution, as well as independent international bodies.

In addition, each restitution mechanism should be based on the definition and identification of the victims of corruption and misappropriation of public funds[96]. This definition should help avoid further misappropriation in the state of origin, but also ensure the restorative effect of restitution, i.e. rebuilding the public services necessary for the realisation and protection of fundamental rights. Such a definition should guide the allocation of assets.

Overall, this definition should make it possible to ensure that each resolution of a case of international corruption or money laundering is accompanied by reparation for the citizens who are victims of these practices.[97].

FACILITATING ACCESS TO JUSTICE AGAINST MULTINATIONALS



Thématique 3

Beyond strengthening multinationals' obligations and liability regimes, there is a need to ensure that victims have an effective access to justice to assert their rights.

Unfortunately, in the context of multinationals' activities, there are many practical and legal hurdles to access to justice, which exist both before and after judicial action.

Among the obstacles prior to judicial action, **the lack of transparency and access to information** on multinationals is a major obstacle to access to justice. Indeed, the opacity that surrounds economic activity hinders the collection of evidence concerning their activities.

Further down the legal process, other obstacles make it difficult for multinationals to be brought to court. In particular, seizures of judicial action by criminal and civil courts are hampered by questions of **jurisdiction and applicable law,** which are inherent to the international nature of such violations.

ACCESS TO INFORMATION AND EVIDENCE ON MULTINATIONALS

Access to evidence is an essential component of **access to justice and the right to a fair trial** as enshrined in Article 6 of the European Convention on Human Rights (ECHR)[98]. It is a necessary instrument for the realization of these rights. These rights would be meaningless if it were impossible to demonstrate the factual elements required to make a justiciable claim[99].

Yet, the cross-border activities of companies and the violations they commit are by their very nature largely opaque. This is due, on the one hand, to the private nature of these activities and, on the other hand, to the fact that violations and offences are kept at a distance within complex value chains. The legal protection granted to trade secrecy, fiscal secrecy, and banking secrecy also contributes to this opacity.

The hidden nature of these activities obstructs access to justice, **particularly when the burden of proof is on the victims to establish a company's liability.** Indeed, the relevant information to establish such evidence is held by the companies themselves. Foreign victims are also confronted with cultural, linguistic, and financial barriers that increase the inequality between the parties involved.

The existing legal instruments are insufficient to remedy this asymmetry between multinationals and victims. In particular, the investigative measures *in futurum* prescribed by Article 145 of the French Code of Civil Procedure are in practice limited[100]. For instance, the oil company Perenco was able to simply refuse to comply with an order issued by the President of the Judicial Court of Paris, requiring it to produce documents on the group's organisation and the possible damages resulting from its activities in the Democratic Republic of Congo[101].

DEVELOPMENTS SINCE 2010

The first edition of Sherpa's handbook contained a number of suggestions aimed at strengthening transparency and access to corporate information. In particular, it advocated for the creation of reporting obligation on social and environmental matters[102] and to ensure third party access to the extra-financial information of transnational companies[103].

Instruments have since been adopted to provide access to corporate information. However, they remain largely unsatisfactory. For instance, the legislature has increased the number of general, thematic and sectoral reporting obligations in a questionable manner[104]. Even when companies comply with these obligations, they remain too general to be useful and not easily accessible, especially for victims located abroad.

These measures have not overcome the information asymmetry between multinationals and their victims. For example, it is not even possible to compile a mere list of the companies subjected to some of these obligations based on publicly available data[105].

Regarding the duty of vigilance, the legislature has added to the obligation to identify and prevent violations an obligation to publish the vigilance plan. This was intended to compensate for the lack of reversal of the burden of proof. However, in practice, the information published by companies is insufficient to enable judicial access, e.g. the omission of the foreign suppliers and subcontractors' names.

More significantly, most of these reports and publications are now used as tools for fair and greenwashing[106].

The legislature has also provided opportunities for third parties to make ad hoc information requests, but these are also limited. Since 2016, there has indeed been the possibility for consumers to request the manufacturer, distributor or producer of a good to disclose information about the good, including in particular information, about the materials used and the supply or production chain. **However, the provision is not subject to judicial review and relies largely on the initiative of consumers and the goodwill of businesses.** The latter may refuse to provide the requested information in order to protect their strategic or industrial interests[107]. Therefore, they are encouraged not to disclose the information.

Lastly, the protection of trade secrecy, which was enacted in 2018, contributes to reinforcing the opacity that surrounds the activities of mulitnationals[108]. This protection provides a broad definition of secrecy, making it potentially opposable to multiple corporate information requests, as the administration's refusal of several communication requests concerning corporate information suggests[109].

Beyond the obstacles for the victims themselves, the opacity of transnational economic activity also limits the action of **investigators and magistrates**[110].

Their investigations are hampered by the **weakness of international cooperation mechanisms.** In particular, international letters rogatory suffer from complex procedures, depending on political considerations and with long response delays[111]. In environmental and financial matters, the **scientific or technical aspects** of litigations are an additional obstacle to evidence gathering.

DEVELOPMENTS SINCE 2010

The first edition of Sherpa's handbook recommended increasing the human and financial resources available to administrative and judicial bodies in charge of ensuring respect for the environment and combating economic and financial crime[112]. Another proposal suggested setting up a mechanism for international judicial cooperation for each national court or administrative agency in charge of economic and financial cases with an international dimension. The mechanism would consist in receiving judges from the corresponding jurisdictions of other countries[113].

To this end, the French legislature has engaged in a process of jurisdictional specialization, with the creation of the French National Financial Prosecutor's Office ("Parquet national financier"), a crimes against humanity division ("Pôle spécialisé dans la lutte contre les crimes contre l'humanité") and, more recently, the designation of specialized courts for environmental matters[114].

The creation of the European Public Prosecutor's Office is also a positive step forward for European judicial cooperation and the fight against impunity, but its scope remains limited to serious infringements of EU rights.

Unfortunately, the legislature has also introduced the use of negotiated justice in financial and environmental matters through the creation of judicially enforced public interest agreements *("Conventions judiciaires d'intérêt public - CJIP")*. These agreements allow companies involved in certain environmental or financial offences to negotiate, with no transparency, the payment of a fine in exchange for the cessation of legal proceedings.

By allowing companies to avoid a public trial, the JPIAs reinforce the opacity and impunity surrounding the activities of multinationals. These negotiated settlements prevent the truth from being revealed through investigations and contradictory debates and thus deprive the justice system of its exemplariness[115]. It also leads to the creation of a two-tier justice system, which promotes the economic interests of the powerful.

Proposal n°6

Guarantee access to information of public interest held by multinationals and strengthen jurisdictional capacities

The relationship between transparency and accountability needs to be questionned. The various vigilance obligations and liability regimes should be systematically separated from the companies' reporting obligations. To ensure access to justice, the asymmetry of information between companies and victims should be addressed by systematically reversing the burden of proof in civil liability regimes.

In addition, **a right of access to information of general public information should be implemented, including when this information is held by multinationals,** as suggested in the first edition of Sherpa's Handbook. The rules on access to environmental information that have gradually been established offer a first step in this direction[116], as well as the provisions concerning consumer access to information on a product's social-manufacturing conditions[117]. Such mechanisms should be subject to judicial appeal in the case companies refuse to comply.

Consideration could also be given to making the conditions for obtaining an *in futurum* investigation under Article 145 of the French Code of Civil Procedure more flexible with regard to information of general public interest held by multinationals. The efficiency of this procedure should be reinforced by the introduction of a dissuasive sanction in case of non-compliance with a judicial decision rendered to secure the disclosure of information.

In order to ensure that access to information is the rule rather than the exception, it seems imperative to limit the scope and effects of the law on trade secrecy, for instance especially with regard to information related to illegitimate competition in exchange for profit[118]. Negotiated justice for corporate entities needs to be put to an end, as it increases opacity and leaves the victims out of the process.

Finally, the reinforcement and specialisation of investigators and jurisdictions must continue. The French judges, once judicial action begins, should be provided with the means to carry out their mission. With regard to the strengthening of judicial cooperation and court capacities, the progress made with the creation of the European Public Prosecutor's Office should be consolidated and the scope of cooperation be extended.

JURISDICTION AND APPLICABLE LAW IN LITIGATION AGAINST MULTINATIONALS

In absence of an international court to try companies, access to justice against multinationals means that national courts must be given the power to rule on abuses that took place abroad, according to a law that is favourable to victims. While French law allows national courts to exercise extraterritorial jurisdiction in certain circumstances, this ability is in fact limited.

In criminal matters, several jurisdictional grounds in principle make it possible for French courts to address criminally reprehensible acts committed abroad: universal jurisdiction for the most serious crimes[119], active or passive personal jurisdiction when the victim or the perpetrator is a French national[120] and acts of complicity in France for an offence committed abroad[121]. However, the conditions for implementing these grounds are restrictive in pratice.

In many cases, the prosecution of offences is limited by the public prosecutor's monopoly. This monopoly means that the initiation of public prosecution ("*action publique*") is reserved for the public prosecutor alone. The current status of prosecutors, who serve subject to the executive branch, renders their discretion problematic in cases that closely affect France's economic and political interests.

A prior complaint by the victim or an official denunciation by the proper authority of the country where the act was committed may also be needed. In some cases, offences can only be prosecuted when they are punishable under both French law and the law of the country where they were committed, according to the double criminality condition. Under French law, complicity in an offence committed abroad usually requires the establishment of the offence by a foreign court's final decision.

DEVELOPMENTS SINCE 2010

The first edition of Sherpa's handbook recommended reducing these various obstacles to the prosecutions of multinationals for acts committed abroad. In order to reduce the role of the public prosecutor's office and provide victims with means of recourse, it was suggested that the requirement that the offence be established by a foreign decision be removed for acts of complicity committed in France[122].

Some legislative developments in this direction are worth noting. In particular, the legislature has made it easier to combat corruption and influence peddling committed abroad by removing the requirement of a final decision by a foreign court in the case of acts of complicity and removing the public prosecutor's office's monopoly[123].

In tax matters, the legislature also partially abolished the "Bercy lock" in 2018[124]. Previously, only the French tax administration had the right to file a complaint against individuals for tax fraud, with the approval of the Fiscal Offences Commission. Neither the public prosecutor's office nor the civil party could act in its place. Now, fraud cases exceeding 100 000 euros are automatically forwarded to the public prosecutor's office. . However, the judiciary still cannot on its own initiative prosecute tax fraud cases unearthed incidentally during investigations into other facts[125].

For certain offences affecting the interests of the European Union, the legislature has abolished the requirement of double criminality and need for a prior complaint by the victim or the authorities[126].

As in the case of corruption and influence peddling, the legislature has also specified that French criminal law is applicable not only when the offender is French but also when the offender is "*a person habitually resident or exercising all or part of his economic activity in the French territory*".

Even more recently, the legislature has simply abolished the double criminality requirement as well as the need for a foreign court's final decision to bring prosecution of complicity by instigation in France of certain crimes committed abroad[127].

Despite this significant progress, limits to applicability of French criminal law remain for many offences committed abroad by French economic actors or those carrying out economic activity in France. Thus, some offences are still difficult to apply extraterritorially. This is particularly true of environmental offences, which are closely linked to companies' international activities[128].

In civil matters, it may be possible to obtain redress in France for damage suffered abroad insofar as the French courts have jurisdiction over a defendant domiciled in France. It thus seems possible to "relocate" litigation against multinationals to France. There is also a subsidiary ground for international jurisdiction based on the denial of justice: *forum necessitatis*.

However, *forum necessitatis* is subject to two conditions. The plaintiff must establish on the one hand that it is impossible in fact or in law to bring action before a foreign court, and on the other hand, that there is a sufficient link with France. These conditions are interpreted restrictively[129].

Moreover, if access to the French courts is possible under the conflict of jurisdictions rules, the conflict of laws rules in principle designate the foreign law as the law applicable to the litigation. These rules could prevent the application of the laws relating to the social responsibility of a parent company in its country of origin. Indeed, Article 4 of the European Regulation on the law applicable to non-contractual obligations (Rome II)[130] establishes the principle of the application of the law of damages, which, if it does not provide for the parent company's liability or is less favourable in social or environmental matters, may thwart the objective of making parent companies accountable and providing access to justice for victims.

Thus, the enactment of new obligations and rules governing the civil liability of companies does not in itself remove these difficulties for access to the courts, unless they are considered as overriding mandatory laws, applicable independent of the conflict of laws rule[131].

Proposal n°7

Remove obstacles to judicial action and the application of French law in litigation involving multinationals

In order to combat international corporate crimes, it is necessary to continue the legislative momentum by removing the remaining obstacles to the prosecution of multinationals as perpetrators or accomplices in crimes committed abroad. The requirements of double criminality, a foreign court's final decision or the public prosecutor's monopoly should be eliminated[132].

With regard to the "Bercy lock", confusion between the executive and the judiciary and the hindrance of the prosecution of serious offences, call for the definitive and complete abolition of this mechanism.

As in the case of corruption or offences affecting the interests of the European Union, it would be interesting to consider applying criminal law more broadly to persons habitually residing or carrying out all or part of their economic activity in the French territory. This clarification could potentially facilitate the prosecution of foreign multinationals present in France through a subsidiary or branch, which, for example, distributes products linked to the commission of certain offences to the French market.

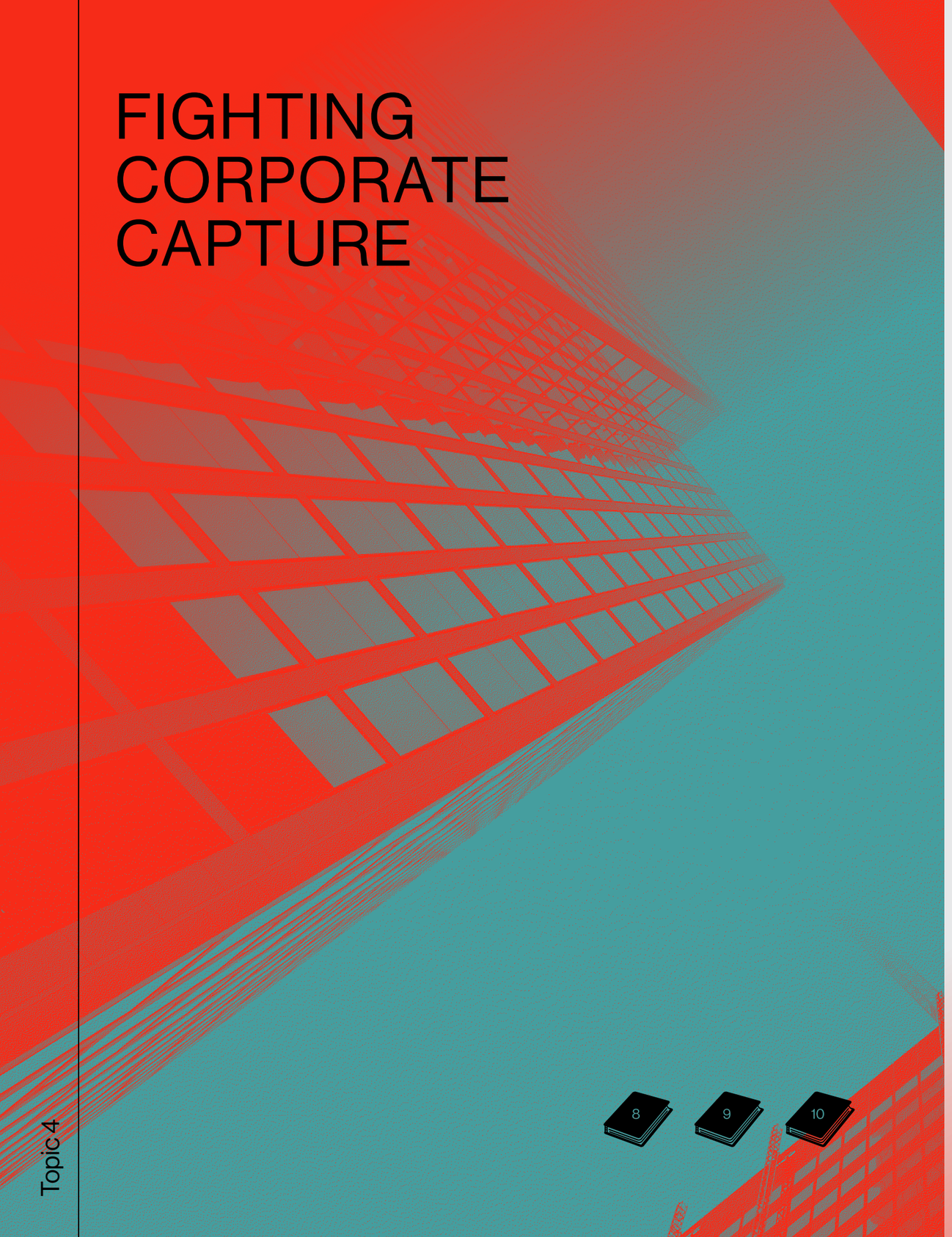
In civil matters, victims must benefit from the most protective regime possible. The regime must enable victims to bring proceedings before the courts of origin of parent or instructing companies. In order to ensure the protection of fundamental rights and the environment, victims must also have the law that is most favourable to them applied..

At a national level, it is necessary to establish that laws on social and environmental liability constitute overriding mandatory rules, or alternatively, move to amend the Rome II Regulation to adapt the conflict of laws rules to the particularities of the social and environmental liability of transnational companies.

One solution, for example, would be to offer the victim a choice between the law of the jurisdiction where the harm occurred, the law of the jurisdiction where the defendant is domiciled, or the law of the jurisdiction where the event giving rise to the harm occurred. This approach is based on the model of the alternative solution provided for in the field of environmental damage[133].

It would also be possible to establish a genuine *forum necessitatis* in matters of abuses committed by companies, the implementation of which would be subject to less strict conditions than those currently applied by the Court of Cassation[134].

FIGHTING CORPORATE CAPTURE



Multinationals have acquired **a capacity to influence public debate and decision-making** known as **corporate capture.** This influence tends to enshrine the interests of these multinationals to the detriment of the public interest. Corporate capture enables multinationals to thwart attempts at regulation that target them[135].

Lobbying and revolving doors constitute a primary form of direct influence. There also are more indirect forms of influence on **academic or scientific discourse** or public opinion through **advertising and marketing.** This secondary form of indirect influence has grown particularly strong in the digital age with the development of **targeted advertising** and **"surveillance capitalism"**[136]**.**

Another manifestation of the influence of multinationals is the **privatisation of the norms of globalisation, which they have achieved with the consent of States.** Companies tend to create their own rules to regulate the internationalisation of their activities, while keeping State regulation out of the picture.

Investment treaties and arbitration tribunals enable companies to manage their international disputes according to the rules they choose. In this context, **State law tends to become merely a product in the market of legal services at the disposal** of economic interests[137].

The creation of **"soft law", i.e. non-binding law, is another manifestation of this phenomenon of privatisation of norms.** As an instrument to make capitalism socially acceptable, soft law enables multinationals to define their responsibilities, either by "adhering" to principles drawn up by States within a multilateral body framework or by producing soft law themselves, individually (codes of conduct, ethical charters) or within multi-stakeholder bodies[138]. The ineffectiveness of these tools, which serve corporate communications and public relations functions more than victims' access to justice, has been widely denounced.

DIRECT INFLUENCE THROUGH LOBBYING AND REVOLVING DOORS

Given the porous overlap between the political and economic spheres, multinationals now have a direct and privileged capacity to influence public decision-making[139]. Lobbying and revolving doors are two examples of this direct influence.

Lobbying refers to the action of groups, individuals, and organisations on behalf of private interests to influence public decision-making and **the enactment of norms, directly with decision-makers.** Lobbying can take different forms (e.g. conferences, meetings, position papers, amendment proposals, etc.) and occurs throughout the entire decision-making process, from policy development to decisions before the Constitutional Council[140].

Lobbying by and for private companies **should be distinguished from advocacy, which, for example, is carried out by public interest groups and trade unions.** There is a fundamental difference between lobbying and advocacy not only as to the nature of these activities, but also as to resources and means available to pursue objectives and access decision-makers[141].

"Revolving doors" refers to a phenomenon specific to the careers of civil servants. The term refers to the migration of public officials to jobs in the private sector, and conversely their return to the public service after a period in the private sector[142]. Former Prime Minister Edouard Philippe, for example, was first appointed to the Conseil d'État after graduating from the Ecole Nationale d'Administration (ENA) in 1997, before becoming a lawyer. After a brief stint in Alain Juppé's cabinet at the Ministry of Ecology, Sustainable Development and Planning in 2007, Philippe became director of public relations for the Areva group between 2007 and 2010, while also holding several elected offices.[143].

These practices are a source of conflict, and even confusion, between public and private interests, and are contrary to the notion of law as an expression of the general will[144]. Revolving doors breed criminal activity, such as illegal interest-taking, favouritism, and influence peddling. Just as with lobbying, revolving doors allow companies to create a legal environment favourable to their interests, and thus avoid the need to bribe public officials downstream to obtain a decision serving their interests[145].

However, these issues have long been a blind spot for legislators. The few mechanisms that have been put in place to combat revolving doors and lobbying lack ambition and fall short of meaningful reform. They focus primarily on transparency, without questioning the legitimacy of these practices[146].

This is especially true of the system put in place in 2016 to regulate lobbying, which provides a limited definition of lobbying applied to a newly created category of "interest representatives"[147]. These lobbyists are required to make an annual declaration of some of their activities. They are also subject to general ethical principles, which are monitored and enforced by the High Authority for the Transparency of Public Life ("*Haute Autorité pour la Transparence de la Vie Publique*" - HATVP)[148].

In practice, such a system does not promote greater traceability in the lawmaking and regulatory processes[149]. The reporting obligations are limited by their one-sided nature, as public officials do not have to report their interactions with lobbyists. Moreover, the information lobbyists are required to declare is irrelevant, particularly with regard to the content of the policy positions advanced, the exact identity of the decision-makers, and the policy decisions targeted by lobbyists. Nor does the frequency of declarations, set at once a year, correspond to the frequency of public policy decisions. Moreover, the HATVP notes that declarants often do not respect the deadlines imposed[150].

With regard to conflicts of interest linked to **revolving doors,** the law criminalises illegal interest-taking and favouritism, and punishes public officials when they advance personal interests ahead of the public interest[151].

Furthermore, the legislature has enacted a system to prevent conflicts of interest but, here again, the system is limited and largely based on transparency, ethics, and legal incompatibilities. Indeed, the legislature has mainly established obligations **to declare assets and interests** to the HATVP, together with an **obligation to abstain** and withdraw from public office for certain administrative or political officials[152].

Until 2019, the legislature had not addressed the issue of revolving doors. The oversight regime enacted to address the issue also lacks ambition and falls short of meaningful reform. Oversight measures merely create obligations to make prior referrals to the HATVP for some of the most exposed positions, while the other measures merely define ethical guidelines and oversight control[153]. Many strategic functions related to the regulation of economic actors are not subject to oversight , particularly within independent administrative or public authorities. For example, Total's legal director was able to join the Financial Markets Authority's sanctions committee in 2021, even though Total is the target of a warning report to the Authority related to potential contradictions, inaccuracies, and omissions in the oil company's financial documents and recent public communications on climate risks[154].

In both cases of lobbying and revolving doors, the response provided by the legislature is not likely to prevent and punish abuses related to the increasingly porous links between economic and political powers.

Proposal n°8

Regulate the practices of direct influence on public decision making such as lobbying and revolving doors

First and foremost, the regulation of direct influence exercised by companies requires a more ambitious and comprehensive definition of the persons and practices involved. In particular, without losing sight of the organic dimension of lobbying, it is imperative to examine **the material definition of lobbying, conflicts of interest, and revolving doors** and set legal, particularly criminal, limits, including prohibitions and sanctions, on material acts.

Since prevention through transparency and the enactment of ethical rules remains only an ideal, it is necessary to strengthen the prohibition and punishment of certain practices that border on breaches of integrity and public trust. In particular, offences such as illegal interest-taking, influence peddling, corruption and favouritism could be extended to prohibit and punish practices such as gift-making and remuneration for participation in conferences.

Regarding lobbying, it is necessary to broaden and clarify the definition of "interest representatives" in view of the wide variety of natural and legal persons who may engage in or who may be the target of lobbying activities directly or indirectly (on their own behalf or on behalf of other organisations).

In particular, a large portion of indirect lobbying expenditures are not accounted for, even though they influence public policy decision-making by shaping public debate and perception of corporate practices.

The reporting and transparency obligations on lobbying activities should be rethought to enable the useful traceability of the public decisions, as well as to ensure, on the one hand, balanced access to public decision-makers for all citizens and, on the other hand, a plurality of expertise for all decision-makers.

Transparency obligations should be extended to decision-makers themselves. The content of reporting requirements should also be updated and improved[155]. The subject of communication and exchanges, the public policy decisions targeted, and the positions advanced by lobbyists and their beneficiaries should be made public. The frequency of reporting should also be adapted.

There is a need for obligations to diversify and balance the interests consulted in public decision-making.

Certain prohibitions could also be envisaged. For instance, the WHO Framework Convention on Tobacco Control provides that States Parties must ensure that their public health policies are not influenced by the tobacco industry's commercial interests[156]. Similarly, one could consider preventing key regulations related to fundamental rights or environmental protection from being influenced by economic interests.

Regarding the prevention of conflicts of interests, reporting obligations as well as prohibitions and legal incompatibilities should be strengthened and widely extended to all public decision-makers, officials, and their staff. In particular, the HATVP's ethical oversight and enforcement of revolving doors should be strengthened and expanded for a maximum number of actors. The scope of prohibitions should be broadened.

INDIRECT INFLUENCE THROUGH CORPORATE COMMUNICATION AND CSR

The corporate capture of lawmaking and regulatory processes also appears in more diffuse and indirect practices, such as influencing public opinion through communication in the broadest sense, whether advertising, marketing, or corporate communication[157].

Television or internet advertisements, posters and displays in public spaces, sponsored content in the press, sports sponsoring, funding for education or research... Indirect influence can take many forms, rely on various media internal or external to a company, and have multiple targets[158].

This communication does not simply state the facts, but rather seeks to influence behaviours and preferences, and gain acceptance[159]. The substantial investment of companies in communication can thus be explained by its impact on two levels: **firstly, the impact it has on consumer practices , and, secondly, its impact on public opinion**[160].

In addition to commercial communication and advertising regarding goods and services, corporate communication also consists of political messaging about a company's structure and objectives, as well as its social or environmental role. Corporate communication and CSR communication allow companies to create a virtuous image of themselves and influence the general public's perception of their activities and products, despite the damage they may cause. **This constitutes a form of soft power that makes it possible for companies to thwart attempts to impose regulations on their activities**[161].

Furthermore, the line between corporate communication and legitimate news is blurred by the monopolisation of the media and a dependence on advertisers. Sponsored content, for example, gives visibility and journalistic credibility to promotional and commercial content[162].

In addition, the development of targeted advertising has greatly increased the influence of certain digital giants. Targeted advertising relies on a colossal infrastructure and complex tools of mass surveillance, data capture, and the exploitation of an individual's attention at the cost of privacy, freedom of choice, and freedom of conscience[163].

Beyond their influence on the content of public debate, **these communication practices have a direct impact on the environment and fundamental freedoms.**

However, these practices are not legally defined nor regulated in accordance with the serious issues they present for democracy. As in many areas of the economy, advertising in France is self-regulated via the *Autorité de Régulation Professionnelle de la Publicité* (ARPP), which brings together advertisers, agencies, and advertising departments.

Commercial communication is only subject to sporadic restrictions of certain forms of communication, products, target audiences, or arguments to protect the environment, consumers, or certain vulnerable groups. For instance, bans and restrictions have been imposed on certain products such as tobacco, alcohol, medicines, credit, travel or energy use[164].

However, the legislature does not take into account the overall impact of commercial or corporate communication on public opinion and, indirectly, on decision-makers.

DEVELOPMENTS SINCE 2010

The first edition of Sherpa's handbook suggested eradicating false advertising related to sustainable development[165].

Currently, the criminalisation of misleading commercial practices is mainly aimed at the economic and technical aspects of the promotion of products and services. With regard to a company's ethical and political propaganda, the criminal code has not yet made it possible to penalize "reputation laundering" through corporate or traditional media.

Even worse, the legislature has increased opportunities for companies to engage in such laundering by adopting numerous pieces of legislation favouring communication over accountability.

Several examples include the "PACTE" law, the creation of the "*entreprise à mission*" status[166], and the prevalence of reporting measures, which have become the cornerstone of CSR communication to the detriment of corporate accountability.

Proposal n°9

Define and provide a legal framework for the commercial and political communication of multinationals

Corporate communication, in terms of both its commercial and political dimensions, needs to be legally defined in order to identify limits and ensure the free-flow of useful information is at the centre of these practices. The French Consumer Code and case law on misleading commercial practices provide an initial basis for this definition as well as the characteristics of lawful advertising.

In order to strengthen the prevention of abuses of commercial and corporate communication and highlight the impact of these abuses, companies could be required to declare all expenses and activities related to influence campaigns to the HATVP. As already mentioned, the directory of interest representatives created in 2016 is based on a limited view of lobbying and influence activities, which does not include communication activities and expenses that indirectly influence decision-makers.

Consideration should also be given to a wider ban on the advertisement of harmful environmental and health activities and products, as well as to stronger bans on the targeting of certain audiences and demographics. Advertising and influencing methods which are themselves environmentally harmful, such as the use of polluting media like digital screens, could also be prohibited.

In order to address developments in online advertising, it is imperative to specifically rethink the market for online advertising, and to strengthen and facilitate the protection of personal data and respect for informed consent. It is also necessary to reconsider the rules on media ownership in order to guarantee their independence and emancipation from advertisers.

Educational and research independence should also be strengthened not only to prevent the misuse of science for commercial purposes, but also to limit overlap between in political and economic circles.

Once again, these preventive measures must be coupled with sanctions that have a real deterrent effect. In particular, image laundering must be subject to criminal sanctions.If the numerous ongoing litigation efforts to sanction image laundering turn out to be unsuccessful[167], consideration should be given to either reforming the offence of misleading commercial practices to clarify its scope or to creating a separate offence for image laundering. In both cases, consideration should be given to ensuring that the statute would apply broadly to any communication emanating from a commercial company.

PRIVATISATION OF GLOBALISATION STANDARDS

Beyond the influence multinationals have over public opinion and decision-making, multinationals have, with the consent of state actors, largely privatised the norms of globalisation through the consecration of "soft law" and recourse to arbitration.

The "**Soft law**" refers to voluntary standards and commitments that are not binding. This alternative legal system has filled a regulatory vacuum left wide open by states. However, it has neither the democratic legitimacy of law, nor its effects[168].

The existence of "soft law" is also used as an argument by companies to defeat attempts at more binding regulation. It allows multinationals to demonstrate their social responsibility by "adhering" to principles drawn up by States within the framework of multilateral bodies, or by producing principles themselves, either individually (codes of conduct, ethical charters) or within multi-stakeholder bodies, if not totally private[169].

Many of these mechanisms encourage the development and use of **non-judicial remedies** for abuses by multinationals and rely on a so-called media sanction[170].

Among these soft law texts are the OECD Guidelines for Multinational Enterprises (hereafter the "OECD Guidelines" or "Guidelines"). The Guidelines require member and adhering states to establish government-supported entities, National Contact Points (hereinafter "NCPs"), whose essential task is two-fold: first, to enhance the Guidelines' effectiveness through advocacy and, second, to handle complaints, known as "specific instances", against companies that have violated the Guidelines.

To achieve these objectives, the OECD Guidelines include a "Procedural Guidance" which calls on states to ensure that their NCPs meet the basic criteria of visibility, accessibility, transparency, and accountability. States should also ensure that their respective NCPs are equipped to handle complaints in an impartial, predictable, fair and consistent manner with respect to the Guidelines.

DEVELOPMENTS SINCE 2010

The first version of Sherpa's handbook suggested converting National Contact Points into true arbitration structures[171].

Having been in place for decades, **the system has revealed its flaws and inefficiencies.** NCPs do not meet their basic criteria and the Guidelines' principles for handling complaints. Observers, and especially users of the system, have widely criticized NCPs for failing to provide effective access to remedies for human rights and environmental abuses by multinationals[172].

Associations and communities that have contacted the French contact point have recognized the failure of this supposed system of privatized and negotiated justice, and acknowledge that the power relations between the parties involved dos not lend itself to negotiation.

Many specific circumstances have resulted in the failure of the system. In several cases, applicants had to withdraw from the process after a few months[173]. On several occasions, **associations and victims ultimately had to take their claims to court.** This is indicative of the waste of time and energy that such mechanisms generate, which ultimately only displaces the problem of impunity by offering companies a way out in the confidentiality of Bercy court hallways[174].

Moreover, since the 2010s, the futility of voluntary commitments has been widely denounced and has led to a stronger demand for legislative and judicial intervention. This has led to both the establishment of commitments in positive law and the occasional judicial sanction of voluntary commitments made by multinationals[175]. the observation remains the same: a **behavioural standards decided by companies** lack any democratic legitimacy.

Arbitration and investor-state dispute resolution mechanisms (ISDS) are further evidence of the extent of the rights granted to multinationals, and their power to influence public decisions. These mechanisms are included in the several thousand bilateral (BITs) and multilateral treaties (such as the Energy Charter) protecting foreign investments. These agreements allow foreign investors to challenge government decisions that they believe are incompatible with the provisions of these treaties before an arbitration tribunal, claiming compensation from the state for the damage suffered.

There has been much criticism of these mechanisms. They give foreign companies the **right to avoid state justice** and access a parallel justice system in public interest cases. Third party stakeholders are denied the right to assert their rights in this context. The vagueness of treaty provisions protecting investors, and the interpretation that has sometimes been given to them by arbitration tribunals, allows multinational to **challenge government decisions taken in the public interest**[176].

Proposal n°10

Challenge the self-regulation of multinationals through "soft law" and establish the supremacy of international public order over international economic order

The adequacy of self-regulation and co-regulation in the field of corporate social and environmental responsibility must be challenged. The priority should be shifted away from voluntary commitments and out-of-court procedures for the settlement of disputes regarding fundamental rights and the environment[177].

The role of independent administrative and public authorities should also be limited in order to restore the judiciary's traditional role in protecting fundamental freedoms and sanctioning behaviour that undermines society's values.

A second step is the subordination of the international economic order to an international public order. This can take two forms: firstly, negotiation and adoption of an international treaty on multinationals requiring states to reassert their role in the governance of globalisation and its effects on fundamental freedoms. The abdication of states in the face of multinationals must not be allowed to continue.

Subordination can also be achieved by amending the Rome Statute to allow for the prosecution not only of individuals, but also of legal entities before the International Criminal Court.

Finally, subordination must involve a strict framework for international arbitration, so as to no longer allow companies to settle their disputes without any consideration of social or environmental factors. The finalization of BITs could be prohibited when they contradict the provisions of the UN Treaty on Business and Human Rights or other treaties on the protection of fundamental rights.

There is a general need for states to denounce, either unilaterally or through negotiation, existing investment treaties and, pending their termination, to adopt notes on interpretation to prevent companies from suing states in disputes involving human rights and the environment.

PROTECTING THE CIVIC SPACE

As freedom of association and expression are *sine qua non* conditions for the realisation of the rule of law and the protection of fundamental freedoms, the protection of civic space must be ensured in the face of increasing attacks, particularly from private actors.

Associations, trade unions, activists, indigenous representatives, whistleblowers and journalists can serve as "rights defenders", whose existence and actions are not only consistent with the realisation of the rule of law and other fundamental freedoms, but also with the protection of the environment[178].

However, these actors are now seeing their activities hampered and their very existence occasionally called into question by multinationals and government authorities[179]. Every year, hundreds of rights defenders, particularly those working to protect the environment, are victims of murder and violence[180]. This shrinking of civic space is happening around the world as well as in Europe. France is no exception[181].

Although France has adopted **a general whistleblower statute** to protect whistleblowers, this protection remains very incomplete. Moreover, **SLAPPs (Strategic Lawsuit Against Public Participation),** which aim to stifle the exercise of freedom of expression through judicial intimidation, are frequently used by companies and institutions against rights defenders when they denounce corporate practices. Despite numerous warnings from civil society, this issue of SLAPPs has still not been addressed by the legislature.

Another illustration of the mistrust of associations is the legislative and judicial tendency to **limit their opportunities to take legal action.** As is often the case, for example, when associations denounce environmental violations by companies or ethics violations involving the private and public sector.

REPRISALS AGAINST WHISTLEBLOWERS

Whistleblowers are individuals or organisations that reveal or report facts or behaviours that pose a risk to the public interest[182]. In a complex globalised world dominated by corporate secrecy and opacity, whistleblowers play a fundamental democratic role in highlighting risks, as well as violations of ethics, fundamental rights, health, and the environment[183].

It is therefore imperative to legally enshrine the status and protection of whistleblowers. This is not an aknowledgment of powerlessness in the face of opacity, but rather a recognition of the complexity and imbalances of our societies, in which key information on issues relating to the public interest is largely controlled by multinationals[184].

Yet whistleblowers are still too often subject to **suspicion and even reprisals, including judicial intimidation and other forms of harassment**[185]. The financial, professional, and psychological consequences of such retaliation are considerable. In France, the legal protections afforded to whistleblowers have long been scattered, unclear, and limited[186].

DEVELOPMENTS SINCE 2010

The first edition of Sherpa's handbook advocated for strengthening the protection granted to whistleblowers, and suggested, in particular, creating an international statute protecting whistleblowers and entrusting an ad hoc institution in each country with the task of applying it[187].

The French legislature established a general whistleblower status and protection regime in 2016[188]. Although this legislation was widely welcomed, its progress is still limited.

First of all, the protection rationae personae, i.e. with regard to the legal standing of the whistleblower, excludes many potential actors from the scope of protection. This is the case in particular for legal persons, such as associations and trade unions, or persons who have had indirect knowledge of the facts or behaviours that are the subject of the whistleblowinge[189].

The inclusion of subjective criteria in the law also draws a line between good and bad whistleblowers, such as those acting in a disinterested manner or whether the disclosure is necessary and proportionate to benefit from criminal immunities[190]. The requirement to comply with a strict three-tiered procedure, which, with rare exceptions, must include internal whistleblowing, deters potential whistleblowers and forces others to face the people most likely to retaliate against them by themselves in an uncertain and unequal procedure[191].

Furthermore, the statutory text limits the protection offered *rationae materiae,* , i.e. with regard to the content of the alert. In particular, the text requires that the disclosures or warnings must concern a "*serious and manifest*" violation of an international ommitment or "*a serious threat or harm to the public interest*". These requirements impose a threshold in terms of harm to the public interest and protect only those disclosures which are made at a relatively late stage of risk, despite the very principle of whistleblowing and the interest in debate on certain issues of public concerns.

The law also excludes from the protection regime the disclosure of defence secrets. And other parts of the statute provide for specific warning mechanisms, so that the link between these different regimes is not always clear[192].

Thus, if whistleblowers fail to comply with the very strict framework provided for in the law, they will necessarily be exposed to reprisals, particularly judicial sanction.

Finally, the protection regime as implemented lacks ambition and falls short of meaningful reform. While it creates criminal immunity for whistleblowers, confidentiality protections of whistleblowing, and whistleblowers' protection against dismissal, psychological and financial support for whistleblowers is still limited, and sanctions in cases of judicial reprisals or the obstruction of the whistleblowing are not effective deterants.

In 2019, the European Union adopted Directive 2019/1937 on the protection of persons who report breaches of EU law. This represents **an opportunity to overcome the limitations of French legislation** and eventually create a genuine, universal whistleblower status as well as a comprehensive protection regime[193].

Proposal n°11

Broadening the status and protection of whistleblowers

Firstly, it is imperative to harmonise protection regimes to achieve maximum protection for whistleblowers, broadly defined, in order to protect all natural or legal persons, in particular associations and trade unions who reveal information of public interest.

In addition, the whistleblowing regime should be truly harmonised and whistleblowing facilitated. In particular, it is imperative to facilitate and protect public whistleblowing by ensuring the anonymity of whistleblowers and safeguarding the individuals and organisations that relay the whistleblowing. Consideration must be given to strengthening the protection and arrangements for whistleblowing related to defence and national security.

Whistleblower' protections should include strengthened mechanisms for preventing reprisals, providing psychological and financial support for whistleblowers, and punishing offenders of these protections. In particular, immunity from prosecution should be broadened, especially for whistleblowers and those who assist them in obtaining and keeping the data and documents necessary for whistleblowing, and not only in the context of their disclosure.

There should be a mechanism for reversing the burden of proof and the prompt procedural handling of cases where retaliation is suspected as a result of whistleblowing.

Finally, sanctions for those who, in any way, hinder or retaliate against whistleblowers or those close to them should be strengthened.

LEGAL ATTACKS ON RIGHTS DEFENDERS THROUGH SLAPPS

SLAPPs consist of companies, institutions, or public persons taking or threatening to take legal action against individuals or organisations that denounce or criticise their activities in order to hinder their ability and willingness to intervene in the public debate[194].

These lawsuits are **multifaceted in nature.** They are based on a wide variety of legal grounds, both civil and criminal[195]. Numerous initiatives in France and abroad have made it possible to identify the various cases that have been described in law, by researchers and in public opinion, as SLAPPs. These initiatives have enabled researchers to identify the common characteristics of SLAPPs [196].

Firstly, SLAPPs are lawsuits that target **contre "watchdogs of democracy"** in response to their efforts to inform public opinion and fuel **a public debate regarding the activities of the perpetrator.**

Secondly, the purpose of these lawsuits is not judicial victory, but **censorship.** Their purpose or effect is to obstruct **the legitimate exercise of freedom of expression** in all its dimensions, and thus to permanently obstruct the democratic role normally played by rights defenders. SLAPPs force their targets to devote resources to their legal defence, diverting them away from their missions. These lawsuits also generate widespread self-censorship within civil society[197].

This characteristic is reflected in the disproportionate and unbalanced nature of the lawsuits. Initiated by powerful actors, SLAPPs regularly involve the introduction of nearly simultaneous lawsuits on several grounds and against multiple defendants. They are also often accompanied by demands that are disproportionate to the financial capacities of the persons concerned. They thus undermine equality of resources and erode trust in the judiciary and its auxiliaries by subverting the purposes of justice[198].

Under these circumstances, it does not matter that under the influence of the European Court of Human Rights in particular, a good number of SLAPPs result in acquittals. It also does not matter that some of these lawsuits may be withdrawn, nor that they result in the claimant being condemned for filing a frivolous claim.

These solutions, although favourable to defendants, are not likely to resolve the devastating effects that SLAPPs have on the rule of law, which are caused by burdensome procedures played out on unequal terms despite the important public interest in the debate they muzzle[199].

Australia, Canada, and some American states have already adopted legislations to prevent the proliferation of SLAPP lawsuits and sanction those who bring them[200].

Proposal n°12

Fighting SLAPPs by amending procedural rules and strengthening sanctions against judicial practices that impede the exercise of freedom of expression

It is imperative to strengthen the mechanisms that restore an even playing field in SLAPP lawsuits and also to effectively sanction these abuses.

In addition to extending the status and protections of whistleblowers, which would bolster the fight against SLAPPs, it is necessary to create a mechanism, particularly a procedural mechanism, to prevent and punish these practices.

First and foremost, it is important to offer solutions to rapidly stop these lawsuits in order to avoid the financial and psychological drain they cause. To this end, it would be possible to allow the targeted parties and judges to raise these abuse more broadly from the outset of proceedings, when their effect is to limit the exercise of freedom of expression in public interest debate. It is also necessary to reverse the burden of proof in SLAPPs in order to restore the balance between the parties involved.

With regard to actions brought on the grounds of media law, in addition to decriminalising defamation, consideration should be given to introducing a form of prosecution and defence when the facts clearly fall within the scope of a public debate, or when lawsuits are brought by a legal person against broadly defined whistleblowers, or to reversing the burden of proof.

In addition, in order to better protect the rights of targeted persons from the phenomenon of forum shopping, it might be useful to modify the rules of jurisdiction and applicable law in relation to defamation within the European Union[201].

Furthermore, it is imperative to strengthen the current sanctions in relation to abusive proceedings, so that they have a real deterrent effect, without prejudice to the damages that may be awarded in relation to the financial and moral prejudice of the persons concerned.

Finally, in order to strengthen the societal sanctions of these practices, it would be interesting to broaden the possibilities offered under offence of obstruction, provided for in Article 431-1 of the Criminal Code, on the model of the offence with regard to whistleblowing to ensure that the statute effectively covers obstruction of the broadly defined whistleblowers' freedom of expression, when the procedures or threats of procedures have the effect of preventing organisations or individuals from exercising their freedom of expression and activities necessary to their missions.

RESTRICTIONS IMPOSED ON ASSOCIATIONS' LEGAL ACTION

Judicial actions enable non-profit associations to defend the statutory objectives they have themselves chosen to defend. These "watchdogs of democracy"[202] play a key role in the fight against impunity for certain crimes by aiding victims through the justice system and, more generally, involving citizens in defending the public interest by getting them to join the associations' actions.

However, there are **increasing restrictions on these associations' judicial action in criminal matters.** In France, public prosecution is initiated and exercised by the public prosecutor, who decides whether or not to prosecute a perpetrator in accordance with the principle of prosecutorial discretion[203]. Under the conditions determined in Article 2 of the Code of Criminal Procedure (CCP), public prosecution may also be initiated by injured parties when they bring civil action[204]. The victim of a crime or misdemeanor can indeed bring civil action to obtain redress for the damage caused by the offence[205]. They can also initiate public prosecution by lodging a "civil party" complaint ("*plainte avec constitution de partie civile*") directly with an investigating judge, a magistrate whose independence from the executive is fully guaranteed[206].

Exercised by associations to defend their statutory objective, civil action is at the forefront of the fight against corruption, and human rights and environmental violations resulting from economic activity. Civil action mitigates the arbitrary nature of prosecutorial discretion and provides necessary support to victims.

Indeed, in cases involving political, diplomatic, or economic interests, the prosecutors' lack of independence from the executive presents a risk of conflict of interest, which may limit their willingness to prosecute[207]. Furthermore, the direct victims of offences are not always identifiable, or may lack the material, psychological, and financial means to initiate criminal proceedings, especially when the offences have been committed abroad.

The prosecution of offences, particularly those related to globalisation, therefore becomes a double-unknown equation, in which both the public prosecutor and the victims are not always willing and/or able to act[208]. Enabling associations to initiate public prosecution through the exercise of civil action is therefore **an imperative to fight impunity and realize the right of access to justice.**

DEVELOPMENTS SINCE 2010

The first edition of Sherpa's handbook suggested strengthening opportunities for associations to initiate public prosecution and exercise their rights as civil parties. In particular, the handbook recommended amending Article 2 of the Code of Criminal Procedure in order to facilitate the action of associations fighting against environmental damage and corruption.

Although in the first few years following this proposal, some developments may have given associations hope, this trend has since been reversed.

Initially, the legislature **gradually established** the role of associations in criminal proceedings by increasing the number of legal authorisations provided for in **Articles 2-1 et seq. of the CCP**[209]. Initiated with authorisations granted to anti-alcohol and anti-racist leagues, these legal authorisations now cover a variety of realms, which the legislature considered **worthy of enhanced protection,** including environmental and consumer protection, the fight against gender-based violence, and corruption.

However, the civil action regime available to associations resulting from these various authorisations is **fragmented and incomplete.** Created in response to scandals and changes in criminal policy, the autorisation conditions provided for in these articles are inconsistent[210]. Some do not in fact enable public prosecution to be initiated.

Some articles make the associations' admissibility conditional on prior executive "approval" ("*agrément*"). In particular, anti-corruption associations are approved by the Minister of Justice according to often subjective criteria, set by a decree of the *Conseil d'Etat*[211]. In reality, the admissibility of anti-corruption associations thus depends not on a court decision but on a governmental decision, even though the associations' legal action as civil parties should attenuate the influence of the executive on the prosecutors' office.

This situation generates a significant risk of arbitrariness, undermines the associations' legal rights, and jeopardises the continuity of their activities. Indeed, associations are granted approval for a **limited period of three years,** which is inadequate for the longer judicial timelines, particularly in matters of international corruption.

The difficulties encountered by the associations Sherpa and Anticor in obtaining the renewal of their respective approvals raise serious questions about the relevance of such a regime[212]. Environmental protection associations also seem to face difficulties[213].

Furthermore, recent case law seems to aim at closing the door to associations' action on the general ground of **Article 2 of the Code of Criminal Procedure** and confine them solely to the restricted boundaries of the legal authorisations and executive approvals provided for in the Code of Criminal Procedure[214]. This trend considerably restricts the ability of associations to defend their statutory objectives, and thus weakens the fight against impunity for certain serious and systemic crimes.

The approval process prevents a large number of associations from accessing criminal justice to defend of their statutory objective and in many cases limits their scope of action to a limited number of offences.

With regard to the fight against international economic crime, this creates an inequitable situation in which, for example, an Indian anti-corruption association lacking executive approval would not be able to bring suit against a French company involved in corruption in India.

Far from enshrining the key role of associations in advancing the rule of law, the current solution endorses a form of **control over their legal action through special authorisations** and reflects the growing suspicion towards "private prosecutors"[215].

Proposal n°13 | Amend the articles of the Code of Criminal Procedure governing the admissibility of associative action to facilitate associations' litigation as a whole

Civil action by associations must be facilitated and the admissibility system must be clarified. In order to put an end to hazardous case law and the legislative authorisations regime failings, it is imperative to proceed with a legislative reform that enshrines the key role of associations in the fight against impunity and clarifies the regime applicable to their legal action.

A solution could be to enshrine the role of associations in criminal proceedings by creating an Article 2-1 generally enshrining their admissibility, with regard to the specificity of the aim and statutory objective pursued. This solution would enshrine a general admissibility while codifying the case law known as "Biens Mal Acquis", which had retained this solution with regard to associations fighting corruption[216].

In order to limit disputes regarding their admissibility, the special authorisation regime could be maintained, while being harmonised with regard to the authorisation criteria. Associations falling within the scope of these authorisations could thus continue to benefit from a form of presumption of admissibility in certain realms of expertise.

The legislature would have to coordinate this system with the general system of Article 2-1 in order to allow associations that are not legislatively authorised, to carry out legal actions that are relevant to their statutory purpose.

Such a solution would be similar to the solutions adopted in administrative matters and to the solutions provided by Spanish or Portuguese law, which enshrine the *actio popularis*.

1. Yann Queinnec and William Bourdon, "Regulating Transnational Companies, 46 Proposals", *Proposal Papers*, Sherpa & Forum for a new World Governance, December 2010, 75 p.

2. Jean Paillusseau, «Les fondements du droit moderne des sociétés», *La Semaine Juridique Notariale et Immobilière*, n° 27, 5 July 1985 ; Marie-Ange Moreau, «La mobilité des salariés dans les groupes de dimension communautaire: quelques réflexions à partir d'une analyse comparée», Travail et Emploi, 53, 1992, p.58 : "*Elusive, fluctuating, diversified economic reality, groups of companies resemble hydras of which the law seems to seize only one head at a time.*" (Our translation).

3. Dalloz, Fiches d'orientation, « Groupe de sociétés », August 2020. (Our translation).

4. Several provisions recognise the group's existence in an indirect way. In commercial law, the capital holding, the voting rights or the influence exercised by one company over another entails rights and obligations for the identified parent companies towards their subsidiaries and holdings, particularly in terms of tax consolidation. Case law has also indirectly recognised the existence of the group and the preponderant role that may be played by parent companies, especially to protect the subsidiaries' creditors or the subsidiaries themselves. However, it does so only occasionally and according to restrictive criteria, for instance in the context of collective proceedings (Com. 19 Dec. 2018, No. 17-27.947), in competition law (Com. 6 Jan. 2015, No. 13-21. 305) or in labour law through the theory of co-employment (Cass. soc. 25 Nov. 2020, FP-P+B+R+I, n° 18-13.769); see on this last subject, Luc de Montvalon, "Le co emploi : une situation (vraiment) exceptionnelle", *Dalloz Actualité*, 11 December 2020.

5. See for a definition of these tools, their advantages and limitations, Commission nationale consultative des droits de l'Homme (CNCDH), *La responsabilité des entreprises en matière de droits de l'homme - Nouveaux enjeux, nouveaux rôles*, study by Olivier Maurel, La Documentation française, Paris, 2009, p. 130.

6. Sherpa, "Regulating Transnational Companies, 46 Proposals", *op. cit.*, see the proposals No. 1 to 3.

7. *Ibid.*, see in particular proposals 8-11, 14, 23, 24 and 36.

8. *Ibid.*, p. 10.

9. Law no. 2001-420 of the 15th of May 2001 on new economic regulations (Loi « NRE »); Law no. 2010-788 of the 12th of July 2010 on a national environmental engagement (Loi « Grenelle II », article 225); Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups Text with EEA relevance; Law no. 2015-992 of the 17th of August 2015on energy transition for green growth (article 173) ; Ordinance no. 2017-1180 of the 19th of July 2017 on the publication of non-financial information by certain large companies and certain groups of companies and the implementing decree no. 2017-1265 of August 9, 2017.

10. Sherpa, "Regulating Transnational Companies, 46 Proposals", *op. cit.*, proposal No. 1 suggested integrating environmental and societal obligations into the definition of a partnership contract, by inserting an additional subparagraph into Article 1832 of the Civil Code. A similar proposal was also formulated in 2012 by Gaël Giraud and Cécile Renouard (*Vingt propositions pour réformer le capitalisme*, Flammarion, 2012) as well as in *the Attali Report* «Pour une économie positive» in 2013 (proposal n°1).

11. Law no. 2019-486 of the 22nd of May 2019 on enterprise growth and transformation.

12. It creates a new subparagraph in Article 1833 of the French Civil Code according to which "*The company is managed in its social interest, taking into consideration its social and environmental impact.*" (Our translation).

13. Article 1835 of the French Civil Code on the drafting of company statutes has been supplemented: "*The statutes may specify a raison d'être, which consists of the principles the company has adopted and for the respect of which it intends to allocate resources in carrying out its activity.*" (Our translation).

14. Creation of Articles L. 210-10 et seq. of the French Commercial Code on the status of "entreprise à mission."

15. See, in particular, concerning the PACTE law: «Réformer l'entreprise», Interview with Olivier Favereau, *Études*, vol. No. 9, 2018, pp. 55-66; Assaël Adary, «Loi PACTE: une opportunité pour les entreprises... et leurs communicants», *COM-ENT*, 12 February 2019 ; Sandra Cossart and Lucie Chatelain, «De la loi sur le devoir de vigilance à la loi PACTE», *Cahiers de droit de l'entreprise*, n°4, July - August 2019.

16. Sherpa, "Regulating Transnational Companies, 46 Proposals", *op. cit*, see proposals N°.21 and 22.

17. The legislator has in fact established various obligations of vigilance incumbent on parent companies, contracting businesses or their managers, in particular regarding concealed work, corruption, money laundering, human rights or environmental violations, protection of personal data, conflict minerals or timber imports. See on this subject, Marie-Caroline Caillet, Marie-Laure Guislain and Tamsin Malbrand, «La vigilance sociétale en droit français», study for Sherpa and Ritimo, coll. Passerelle, Coredem, Paris, December 2016; on corruption, see Marie-Emma Boursier, «Groupes internationaux de sociétés : corruption internationale et mondialisation du risque pénal» *Droit pénal* n° 1, January 2016, study 1.

18. The requirements may vary depending on the company form, the sector of activity, the number of employees or the turnover of the company. The obligations are generally placed on the parent companies or their directors and are exercised vis-à-vis the other companies in the group, including those located abroad. Controlled subsidiaries are often exempted from fulfilling these obligations themselves. Some obligations are extended beyond the group into subcontracting or supply chains.

19. See especially, with regard to the duty of vigilance in social and environmental matters, Guillaume Delalieux, «Devoir de vigilance», *Revue Projet*, vol. 352, no. 3, 2016, pp. 78-87.

20. Law n° 2017-399 of 27 March 2017 on the duty of vigilance of parent and instructing companies.

21. Article L. 225-102-4 of the Commercial Code created by the law refers only to companies "*which employ, at the end of two consecutive financial years, at least five thousand employees within the company and in its direct or indirect subsidiaries whose head office is located in France, or at least ten thousand employees within the company and in its direct or indirect subsidiaries whose head office is located in France or abroad.*" (Our translation).

22. Commercial Code - Art. L. 233-16, II "*Exclusive control by a company results from: 1° either the direct or indirect holding of the majority of voting rights in another company; 2° or the appointment, for two successive financial years, of the majority of the members of the administrative, management or supervisory bodies in another company. The consolidating company shall be presumed to have made such an appointment where, during that period, it directly or indirectly held more than 40% of the voting rights and no other member or shareholder directly or indirectly held more than its own; or 3° the right to exercise a dominant influence over an company under a contract or under clauses in the articles of association, when allowed by the applicable law.*" (our translation).

23. However, the duty of vigilance could be characterised as a "reinforced" obligation of means, implying that the burden of proof would be on the company to demonstrate that its vigilance measures meet the legal requirements.

24. Preliminary draft reform of the law of obligations and the law of prescription, P. Catala (dir.), submitted to the Minister of Justice in 2005; Pour une réforme du droit de la responsabilité civile, F. Terré (dir.), Dalloz, 2011; Etudes offertes à VINEY (G.), Vers un nouveau fait générateur de responsabilité civile : les activités dangereuses (commentaire de l'article 1362 de l'Avant-projet CATALA), LGDJ, 2008, p.499 ; Jaakko Salminen, "From product liability to production liability: Modelling a response to the liability deficit of global value chains on historical transformations of production", *Competition & Change,* 2019, Vol. 23(4) 420-438.

25. Hélène Dumont, «Criminalité collective et impunité des principaux responsables : est-ce la faute du droit pénal ? Introduction : un état de la question», *Revue de science criminelle et de droit pénal comparé,* vol. 1, no. 1, 2012, pp. 3-18.

26. Law n° 92-683 of 22 July 22, 1992 reforming the general provisions of the Criminal Code and Law n° 2004-204 of 9 March 2004 adapting the justice system to changes in crime (Perben II).

27. Juliette Tricot, «Le droit pénal à l'épreuve de la responsabilité des personnes morales : l'exemple français», *Revue de science criminelle et de droit pénal comparé,* vol. 1, no. 1, 2012, pp. 19-46.

28. Crim. 25 nov. 2020, Fp-P+B+I, n° 18-86.955 ; Julie Gallois, «*Responsabilité pénale de la société absorbante pour des faits commis par la société absorbée*», *Dalloz Actualités,* 10 December 2020.

29. Criminal Code, Art. - 121-2 "*Legal persons, excluding the State, are criminally liable, according to the distinctions of Articles 121-4 to 121-7, for offences committed, on their behalf, by their bodies or representatives. However, local authorities and their groupings are only criminally liable for offences committed in the exercise of activities that may be the subject of public service delegation agreements. The criminal liability of legal persons does not exclude that of individuals who are perpetrators or accomplices in the same acts, subject to the provisions of the fourth paragraph of Article 121-3.*" (Our translation).

30. Emmanuel Mercinier-Pantalacci et Maria Snitsar, «Le point sur la responsabilité pénale des personnes morales - Crim. 16 June 2021, n° 20-83.098», *AJ Pénal,* 2021, p.413 ; Jean-Christophe Saint-Pau, «L'évolution de la responsabilité pénale des personnes morales : d'une responsabilité par représentation à une responsabilité sans représentation ?», dans *La cohérence des châtiments. Essai de Philosophie pénale et de criminologie,* Dalloz, vol. 10, 2012, p. 41.

31. Marie-Christine Sordino, «Réflexions sur la dépénalisation du droit des sociétés commerciales», *La lettre juridique,* n°665, 28 July 2016.

32. Tribune collective, «La responsabilité environnementale ne se négocie pas !», *Le Monde,* 8 December 2020.

33. Law n° 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique, Article 17.

34. Juliette Tricot et Tatiana Sachs, «La loi sur le devoir de vigilance : un modèle pour (re)penser la responsabilité des entreprises», *Droit et Société,* n° 106/2020: "*The Sapin 2 Law illustrates the extent to which, under the scrutiny of compliance, the conditions of criminal liability are transformed without any need to modify the basic rules that establish it. This is the strength of the logic of compliance which, without excluding criminal liability, organises its avoidance.*" (Our translation).

35. The mechanism now also covers influence peddling, tax fraud and certain environmental offences; Laura Rousseau & Martin Méric, «Les inconvénients de la justice négociée en matière de criminalité financière», *Dalloz Actualités,* 2 June 2020.

36. CC, Décision n° 2017-750 DC du 23 mars 2017, Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre.

37. Speech by François Molins, Attorney General, at the opening of the conference: «L'environnement : les citoyens, le droit, les juges - Regards croisés du Conseil d'Etat et de la Cour de cassation», 21 May 2021.

38. Lucas d'Ambrosio, «L'implication des acteurs privés dans la lutte contre la corruption : un bilan en demi-teinte de la loi Sapin 2», *Revue de science criminelle et de droit pénal comparé,* vol. 1, no. 1, 2019, pp. 1-24.

39. Yves Chaput, « La pénalisation du droit des affaires : vrai constat et fausses rumeurs », *Pouvoirs,* vol. 128, no. 1, 2009, pp. 87-102.

40. As envisaged in part in the first version of the Handbook of proposal and in the context of the first Duty of Vigilance Bill (Bill 1519 of November 6, 2013 on the duty of vigilance of parent companies and ordering companies).

41. Criminal Code - Art. 321-1 "*Concealment is the act of concealing, holding or transmitting a thing, or acting as an intermediary in order to transmit it, in the knowledge that the thing is the proceeds of a crime or offence. Receiving stolen goods also means knowingly benefiting, by any means, from the proceeds of a crime or offence. Receiving stolen goods is punishable by five years' imprisonment and a fine of 375,000 euros.*" (Our translation).

42. Since 2013, article 324-1-1 of the Criminal Code state that "*Property or income is presumed to be the direct or indirect proceeds of a crime when the material, legal or financial conditions of the investment, concealment or conversion operation cannot have any other justification than to conceal the origin or the beneficial owner of the property or income.*" (Our translation).

43. Such a sanction might require a review of the drafting of Article L.242-6 of the Commercial Code, which sanctions the presentation of unfaithful annual accounts: Julie Gallois, «Comptes consolidés infidèles et comptes annuels infidèles : ne pas confondre», *Dalloz Actualités,* 11 March 2021.

44. See recommendations 1, 2 and 3 of the recent opinion of the National Consultative Commission on Human Rights (CNCDH), *Avis sur la traite des êtres humains à des fins d'exploitation économique,* 15 October 2020, A - 2020 – 15.

45. Code of Criminal Procedure, Art. 9-1 - « *Notwithstanding the first paragraph of Articles 7 and 8 of this Code, the limitation period for public action in respect of concealed or hidden offences shall run from the day on which the offence came to light and was established in conditions that allowed public action to be initiated or exercised, but the limitation period may not exceed twelve completed years for misdemeanours and thirty completed years for felonies from the day on which the offence was committed. A concealed offence is one which, because of its constituent elements, cannot be known either to the victim or to the judicial authority. A concealed offence is one in which the perpetrator deliberately carries out any manoeuvre designed to prevent its discovery.*" (Our translation).

46. Corporate Observatory Europe, Big Four, big influence: architects of corporate tax avoidance embedded in EU policy-making to fight the problem, 10 July 2018.

47. Will Fitzgibbon, "US lawmakers call for crackdown on financial 'enablers' after Pandora Papers", *ICIJ,* 7 October 2021; plusieurs autres *leaks* avaient déjà permis d'alerter sur cette problématique: Joan Tilouine, «Luanda Leaks» : le rôle trouble des géants de l'audit», *Le Monde,* 20 January 2020 ; *L'Express* via AFP, «L'affaire Dos Santos dévoile les pratiques des cabinets d'audit, « facilitateurs » d'abus financiers», 22 January 2020.

48. Organization for Economic Co-operation and Development (OECD), *En finir avec les montages financiers abusifs : Réprimer les intermédiaires qui favorisent les délits fiscaux et la criminalité en col blanc,* 2021 ; Financial Action Task Force (FATF), *Professional Money Laundering,* 2018, Paris, France.

49. Monetary and Financial Code - Art. L.561-2; see also, Directive EU 2018/843 amending Directive (EU) 2015/849 on the prevention of use of the financial system for the purpose of money laundering or terrorist financing as well as Directives 2009/138/EC and 2013/36/EU (5th Anti-Money Laundering Directive) and Order No. 2020-115 of 12 February 2020 reinforcing the national mechanism to combat money laundering and terrorist financing, JORF No. 0037 of 13 February 2020.

50. Assemblée nationale, Rapport d'information n°4314 présenté par MM. Ugo Bernalicis et Jacques Maire, 6 July 2021, p.63: "*Some professionals in the legal and accounting fields have developed strategies for avoiding this by developing legally separate entities in parallel with their regulated activities, registered under APE codes that exempt them from their obligations since they are not listed in Article L. 561-3 of the Monetary and Financial Code, or whose designated managers do not belong to the regulated professions*". (Our translation).

51. Monetary and Financial Code - Art. L. 561-5-I.

52. Service de renseignement et d'action contre les circuits financiers clandestins.

53. Monetary and Financial Code - Art. L. 561-15.

54. Monetary and Financial Code - Art. L. 561-22 IV.

55. Statistics published by Tracfin in its annual report show that of the 111,671 suspicious transaction reports received in 2020 in all sectors, Tracfin exercised its right to object only 50 times, 30 of which were of an exceptional nature related to the health crisis, as the services were mobilised to detect fraud in the short-time working scheme (Tracfin, *Annual Activity Report 2020,* pp. 12 and 69).

56. Carolijn Terwindt & Tara Van Ho, "Assessing the Duty of Care for Social Auditors", *European Review of Private Law* 27/2, 2019, pp. 379-401.

57. Clean Clothes Campaign, *Fig Leaf for Fashion,* September 2019 ; Genevieve LeBaron et Jane Lister, "Ethical Audits and the Supply Chains of Global Corporations", Report, SPERI Global Political Economy Briefs, Sheffield Political Economy Research Institute (SPERI), University of Sheffield, 2016; MSI Integrity, « Not Fit-for-Purpose: The Grand Experiment of Multi-Stakeholder Initiatives in Corporate Accountability, Human Rights and Global Governance », July 2020.

58. Guillaume Delalieux, "Devoir de vigilance", *Revue Projet,* 2016/3 (N° 352), p. 78-87; Carolijn Terwindt & Miriam Saage-Maass, "Liability of social auditors in the textile industry", *ECCHR and FES Policy Paper,* December 2016.

59. Frédérique Perrotin, «Déclaration des dispositifs fiscaux potentiellement agressifs : des précisions», *LPA,* 9 July 2020, n° 152t3, p.3; Frédérique Perrotin, «Responsabiliser les intermédiaires fiscaux», *LPA,* 10 December 2019, n° 148a0, p.4.

60. Chara de Lacey, "Social audit liability: hard law strategies to redress weak social assurances", *Corporate Legal Accountability Briefing,* Business and Human Rights Resource Center (BHRRC), September 2021: "*To ensure victims have access to relevant evidence, parties to the social audit contract should remove contractual barriers to disclosing audit reports. Rights-holders and their representatives should have access to audit reports so they can verify whether they accurately reflect conditions at the audited site and assess options to redress audit failings.*"

61. Pierre d'Azemar de Fabrègue & Nicolas Nezondet, «Conseils en matière fiscale : les limites avec les notions de complicité fiscale et pénale», *La Revue fiscale du patrimoine,* n° 5, Mai 2020; Patrick Cocheteux, «Le glissement de la responsabilité du conseil comme complice de la fraude fiscale vers coauteur du délit», LPA, 4 December 2017, n° 128e5, p.8.

62. In contrast to the relaxations provided by the PACTE Act, which facilitated the joint exercise of audit and advisory activities: Olivia Dufour, «Déontologie des commissaires aux comptes : la fin des interdits ?», LPA, 26 novembre 2019, n° 149e4, p.4; Ludovic Arbelet, «Marché juridique : les nouvelles armes de la profession comptable libérale», *Dalloz Actualités,* 1st april 2019.

63. Gilles Carbonnier, «La malédiction des ressources naturelles et ses antidotes», *Revue internationale et stratégique,* vol. 91, no. 3, 2013, pp. 38-48 ; Ivan du Roy, «16. Quand les multinationales prennent le pouvoir», Bertrand Badie éd., *Qui gouverne le monde ?* La Découverte, 2018, pp. 214-222.

64. Assemblée nationale, Rapport d'information présenté par Mme Bénédicte Peyrol et M. Jean-François Parigi en conclusion des travaux d'une mission d'information, relative à l'évasion fiscale internationale des entreprises, enregistré à la Présidence de l'Assemblée nationale le 12 septembre 2018.

65. Damien Millet et Éric Toussaint, «14. Enchaînés par la dette !», Bertrand Badie éd., *Qui gouverne le monde ?*, La Découverte, 2018, pp. 197-204 ; Marie Maurisse, «Les « fonds vautours » sous l'œil soupçonneux de l'ONU», *Le Monde,* 11 August 2015 ; Caroline Lequesne-Roth, «La fin des « vautours » ? Retour sur le contentieux stratégique des dettes souveraines», *Revue internationale de droit économique,* vol. XXXII, no. 3, 2018, pp. 351-367..

66. Christian Chavagneux, «Maintenir la pression», *Alternatives Économiques,* vol. 279, no. 4, 2009, pp. 8-8: "*Article 47 of the Swiss Banking Act of 1934 has been one of the country's most successful exports. By stating that any bank employee who gives out information about the identity of his clients, national or foreign, is liable to a criminal offence, this law was one of the pillars of Switzerland's establishment as a tax haven. A measure quickly copied at the time, from Liechtenstein to the Bahamas.*" (Our translation).

67. Sur l'utilisation des pavillons de complaisance, Organisation de Coopération et de Développement Économique (OCDE), *Evading The Net: Tax Crime in the Fisheries Sector,* 2013, p.31 ; Environmental Justice Foundation (EJF), O*ff the hook - how flags of convenience let illegal fishing go unpunished,* 2020.

68. Sophie Lemaître, *Corruption, évitement fiscal, blanchiment dans le secteur extractif: de l'art de jouer avec le droit.* Rennes, Presses Universitaires de Rennes, «L'univers des normes», 2019 ; Ronen Palan & al. «Les paradis fiscaux : entre évasion fiscale, contournement des règles et inégalités mondiales», *L'Économie politique,* vol. 42, no. 2, 2009, pp. 22-40.

69. Christian Chavagneux et Ronen Palan, "Au coeur de la mondialisation", in Christian Chavagneux éd., *Les paradis fiscaux.* Paris, La Découverte, «*Repères*», 2017, p. 7-24: "*An interesting type of definition because it highlights two important properties of tax havens. The first is that their development is not a spontaneous phenomenon but the result of state strategies. Indeed, all tax havens offer the same characteristic: the use of their sovereignty to shape laws (or a lack of laws) to meet their clients' demands. (...) The second feature is based on the distinction between traditional territorial attractiveness policies and what tax havens offer: the latter create their competitive advantages through a reduction of all kinds of regulatory constraints in order to attract foreign activities that would otherwise have no interest in these territories. Only the FSB completes its definition with a third, essential specificity of tax havens. It is that these financial centres do not seek to have the companies they want to attract set up or physically relocate to their territory. (...) Tax havens are part of globalisation by offering a fictional legal residence to their clients.*" (Our translation).

70. *Ibid.*

71. Emile van der Does de Willebois, Emily M. Halter, Robert A. Harrison, Ji Won Park, & J. C. Sharman, The Puppet Masters: *How the Corrupt Use Legal Structures to Hide Stolen Assets and What to Do About It,* Stolen Asset Recovery Initiative (StAR), la Banque Mondiale et UNODC, 2011 ; Organisation de coopération et de développement économiques (OCDE), *Rapport sur la corruption transnationale : Une analyse de l'infraction de corruption d'agents publics étrangers,* Éditions OCDE, 2014, voir notamment p. 30.

72. Sébastien Laffitte, «9. L'argent caché : paradis fiscaux, optimisation et évasion fiscale», *Regards croisés sur l'économie,* vol. 24, no. 1, 2019, pp. 149-162: "*Thus, the use of tax havens, in addition to depriving states of tax revenues, would contribute to make the tax system less progressive, even regressive, and to enrich the richest individuals and companies. Another reason is likely to be the complex tax engineering by individuals and companies to remove their income from normal taxation. The LuxLeaks as well as recent books (e.g. Shaxson, 2018) have highlighted the complexity of tax haven arrangements*"; Lucie Watrinet. "Country-by-country reporting: transparency in all its states," CCFD-Terre Solidaire, Ritimo.org, November 21, 2017: "In the context of globalization, tax evasion by multinationals contributes to shifting of tax burdens to least mobile tax bases, namely SMEs and less well-off individuals." (Our translation).

73. Benoît Collombat, «Aux origines des caisses noires du patronat», Benoît Collombat éd., *Histoire secrète du patronat de 1945 à nos jours. Le vrai visage du capitalisme français.* La Découverte, 2014, pp. 291-300. "*March 2009: a few days before the G20 (...), which was supposed to rebuild the rules of world finance in the midst of the crisis, the monthly magazine Alternatives Economiques threw a spanner in the works. Under the title "The end of tax havens?", the magazine's survey shows that all CAC 40 companies have subsidiaries in the world's tax havens. A total of 1,500 offshore subsidiaries, spread over some thirty territories offering advantageous tax treatment: from the Cayman Islands to Singapore, via Mauritius, Bermuda, Malta, Monaco, Switzerland and, of course, the City of London."; some economists estimate that 45% of multinationals' profits worldwide are artificially relocated to tax havens:* Thomas Tørsløv, Ludvig Wier & Gabriel Zucman, €600 Billion and Counting: Why High-Tax Countries Let Tax Havens Flourish, November 2017. (Our translation).

74. Eric Robert, «Chapitre 4. Transparence fiscale», Michel Hunault éd., *La Lutte contre la corruption, le blanchiment, la fraude fiscale*. Presses de Sciences Po, 2017, pp. 117-135.

75. Sherpa, "Regulating Transnational Companies, 46 Proposals", *op. cit,* see proposal n° 44, p.70.

76. Law No. 2013-672 of 26 July 2013 on the separation and regulation of banking activities (Article 7); the system was subsequently made mandatory at the European level by Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 relating to the taking up and pursuit of the business of credit institutions and to the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, Article 89. (Our translation).

77. Manon Aubry, Thomas Dauphin & Lucie Watrinet, *Sur la piste des banques françaises dans les paradis fiscaux,* CCFD Terre Solidaire, Oxfam France, Secours Catholique et Plateforme Paradis Fiscaux et Judiciaires (PPFJ), 16 March 2016: la «*déconnexion entre les bénéfices déclarés et l'activité économique réelle peut indiquer l'utilisation abusive des paradis fiscaux, pour contourner l'impôt ou certaines obligations réglementaires.*»

78. *Code général des impôts - Article 223 quinquies C; created by the Loi n° 2015-1785 du 29 décembre 2015 de finances pour 2016, this reporting obligation constitutes the transposition into domestic law of an OECD recommendation, taken up by the European Union in Council Directive (EU) 2016/881 of 25 May 2016 amending Directive 2011/16/EU as regards automatic and compulsory exchange of information in the field of taxation.* (Our translation).

79. CC, Decision No. 2016-741 DC of 8 December 2016 on the Law on transparency, the fight against corruption and the modernisation of economic life.

80. Chantal Cutajar, «Identification du bénéficiaire réel, un leurre au sein de la 4ème directive blanchiment ?, *La Semaine Juridique, Edition Générale,* n° 19-20, 11 May 2015, 554: "*The identification of the real beneficiary of companies and legal arrangements is the key stumbling block in investigations of corruption, serious tax fraud and money laundering from illegal trafficking. The fact that companies can be set up with shareholders or directors acting on behalf of the real beneficiary makes it impossible for prosecuting authorities to identify the perpetrators and to seize and confiscate their assets.*" (Our translation).

81. Sherpa, "Regulating Transnational Companies, 46 Proposals", op. cit, voir la propoal n°45, p. 70.

82. EU Directive 2018/843 of May 30, 2018, modifying EU Directive 2015/849 ; Ordinance n° 2020-115 of February 12, 2020 and the decrees n° 2020-118 et n° 2020-119 of February 12, 2020, published in the official record of February 13, 2020.

83. *Monetary and Financial Code* - Art. L. 561-2-2: "*For the purposes of this chapter, the beneficial owner is the individual or individuals: 1° Either who ultimately control, directly or indirectly, the customer; 2° Or for whom a transaction is executed or an activity carried out. (...)*". (Our translation).

84. *Monetary and Financial Code,* Art. L. 561-45-1; l'Institut national de la propriété intellectuelle (INPI) assure, à travers sa plateforme datainpi.fr, la publicité des données relatives aux bénéficiaires effectifs des personnes morales.

85. *Actes du 131ème congrès du Conseil National des Greffiers des Tribunaux de Commerce,* Lyon, 3 and 4 October 2019, p.115.

86. For a comparative overview of the different existing international legislation on beneficial ownership transparency and its limitations, see, voir Moran Harari, Andres Knobel, Markus Meinzer & Miroslav Palanský, *Ownership registration of different types of legal structures from an international comparative perspective State of play of beneficial ownership - Update 2020,* Tax Justice Network (TJN), 1st June 2020.

87. Samuel Delpeuch, «Quelles pistes pour lutter contre l'évasion fiscale ?», *Regards croisés sur l'économie,* vol. 24, no. 1, 2019, pp. 249-255.

88. See the limits linked to the declaration thresholds as well as the possible sanctions in case of non-declaration, Theo Van der Merwe, "Beneficial ownership registers: Progress to date", *U4 Helpdesk Answer,* CMI U4 Anti-Corruption Resource Centre, 8 April 2020; notamment: "*In some jurisdictions, courts can also dissolve legal persons and seize their assets. This is the case in Denmark, where the Danish Business Authority (DBA) dissolved around 7,500 companies that had not registered their beneficial ownership information in the public register in 2018. In 2019, 99.80% of the entities covered by company law under the authority of the DBA had registered their beneficial ownership information (FATF 2019).*" (Our translation).

89. Sébastien Laffitte, «9. L'argent caché: paradis fiscaux, optimisation et évasion fiscale», *op. cit.*

90. *This term refers to "all public assets and property embezzled from a State's budget and placed abroad for personal use. It is thus an illicit enrichment, i.e. a substantial increase in the assets of a public official, or any other person, which they cannot justify in terms of their income.*", Transparency International France.

91. Sherpa, *Biens mal acquis : la restitution des avoirs à l'Ouzbékistan ordonnée par la justice française doit servir l'intérêt général et s'accompagner de garanties de transparence et d'intégrité,* Communiqué de presse, 11 July 2019.

92. *Convention des Nations Unies contre la corruption (UNCAC ou convention de Merida),* Assemblée générale des Nations unies 31 October 2003 – Chapitre V.

93. Sherpa, "Regulating Transnational Companies, 46 Proposals", *op. cit*, Proposal n°46, p. 71.

94. Maud Perdriel-Vaissiere & Thomas Ballot, «Pour une restitution des avoirs volés aux populations victimes, les enseignements de l'affaire des « Biens Mal Acquis », Sherpa et Transparency International France (TIF), 19 novembre 2014 ; Asset Recovery, UNCAC Coalition ; Transparency International France, *Biens mal acquis: La société civile élabore 10 principes pour une restitution responsable des avoirs détournés,* 9 novembre 2020..

95. Loi n° 2021-1031 du 4 août 2021 de programmation relative au développement solidaire et à la lutte contre les inégalités mondiales.

96. Raid UK, Rapport - Republic Democratic of Congo, Congo's victim of corruption, 28 janv. 2020, p. 43 s.

97. Sophie Lemaître, «*Corruption internationale et blanchiment: il est temps d'utiliser les profits illicites saisis dans l'intérêt général !*», *Insights*, U4 Anti-corruption Resource Center, 27 octobre 2020; Juanita Olaya Garcia, «*Reparations for Corruption: How Corruption Enforcement Ignores Victims' Rights*», UNCAC Coalition, 28 february 2020; Genevieve Theriault-Lachance, «*When will prosecutors identify and compensate overseas victims of corruption?*», *The FCPA Blog,* 26 May 2020.

98. The Court of cassation judges consider that «*In so deciding, without investigating whether the disputed production was not essential to the exercise of the right to evidence, and proportionate to the conflicting interests at stake, the court of appeal did not give a legal basis to its decision.*» (Cass. 1st Civ., Apr. 5, 2012, No. 11- 14.177). Or, that «[...] *it is an infringement of the principle of equality of arms resulting from the right to a fair trial guaranteed by Article 6 of the European Convention on Human Rights to prohibit a party from establishing an element of fact crucial to the success of its claims* [...].» (Cass. com., May 15, 2007 n° 06-10.606). (Our translation).

99. Mustapha Mekki, «La fondamentalisation du droit de la preuve : Réflexion sur les dangers d'un « droit à la vérité », *RDA,* n° 11, Oct. 2015, p. 58 : «*Evidence, like the trial, translates a substantive right into action, a right to fight. The antiphon is famous: Idem est non esse et non probari, not to be or not to be proven, it is a whole. Thus, evidence is on the borders of fact and law. It is «the ransom of law». [...] Evidence is an instrument for the realization of substantial rights*" (Our translation).

100. *French Code of Civil Procedure* (our translation) :
Art. 145 - «*If there is a legitimate reason to preserve or establish before any trial the facts on which the dispute's outcome could depend, legally admissible investigative measures may be ordered at the request of any interested party, by petition or in summary proceedings.*"
Art. 146 - «*An investigative measure may only be ordered on a fact if the requesting party does not have sufficient elements to prove it.*
In no case may an investigative measure be ordered to substitute for the party's failure to provide evidence."
Art. 147 - «*The judge must limit the measure to what is sufficient for the dispute outcome, endeavoring to adopt what is the simplest and least costly.*»

101. Sandra Cossart & Laura Bourgeois, «L'article 145 du Code de procédure civile : un outil insuffisant pour la preuve des violations économiques de droits fondamentaux», *Semaine sociale Lamy,* 5 October 2020, p. 10 ; Joan Tilouine, «Perenco, boîte noire pétrolière et toxique en RDC», *Le Monde,* 9 October 2019.

102. Sherpa, "Regulating Transnational Companies, 46 Proposals", *op. cit,* p. 32.

103. *Ibid.*, p. 38.

104. Many instruments now include disclosure and reporting obligations : Law no. 2001-420 of the 15th of May 2001 on new economic regulations (Loi «NRE»); Law no. 2010-788 of the 12th of July 2010 on a national environmental engagement (Loi «Grenelle II», article 225); Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups Text with EEA relevance; Law no. 2015-992 of the 17th of August 2015 on energy transition for green growth (article 173) ; Ordinance no. 2017-1180 of the 19th of July 2017 on the publication of non-financial information by certain large companies and certain groups of companies and the implementing decree no. 2017-1265 of 9 August 2017; Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market Text with EEA relevance; Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high risk areas.

105. SSherpa, CCFD Terre Solidaire, *Radar du devoir de vigilance : identifier les entreprises soumises à la loi,* June 2019 ; Sherpa, «Secret des affaires et transparence minerais de conflits: Sherpa saisit la justice», via *Le Club de Mediapart,* 14 October 2020.

106. Renaud Fossard, *Big Corpo: Encadrer la pub et l'influence des multinationales : un impératif écologique et démocratique,* Système publicitaire et influence des multinationales (SPIM), May 2020, p. 46.

107. *French Consumer Code* (our translation) :
Art. L. 113-1 - «*The manufacturer, producer or distributor of a product marketed in France shall communicate to a consumer who so requests and who is aware of serious elements that cast doubt on the product manufacturing in conditions that respect international conventions on fundamental human rights, any information that he or she possesses concerning one of the following elements: geographical origin of the materials and components used in the manufacture, quality controls and audits, organization of the production chain and the identity, geographical location and qualities of the manufacturer, his or her subcontractors and suppliers.*
When the manufacturer, producer or distributor does not have the information requested, he or she must inform the consumer who made the request.
The list of agreements mentioned in the first paragraph is specified by decree. »
Art. L. 113-2 - « *If the disclosure of information to the consumer, pursuant to article L. 113-1, is likely to seriously compromise the strategic or industrial interests of the manufacturer, producer or distributor concerned by the request, the latter may decide not to disclose it, on condition that it gives reasons for doing so.*»

108. Law No. 2018-670 of 30 July 2018 on the protection of trade secrets.

109. Sherpa, «Secret des affaires et transparence minerais de conflits: Sherpa saisit la justice», *op. cit.*

110. Renaud Van Ruymbeke, *Mémoires d'un juge trop indépendant,* Tallandier, 7 January 2021, 304 p.

111. Antoine Bloch, «*Dans les coulisses de l'entraide judiciaire internationale,» Dalloz Actualité,* 8 June 2020; French Senate, Report No. 613 (2019-2020) by Ms. Sophie Joissains and Mr. Jacques Bigot, made on behalf of the Committee on European Affairs Committee and the Committee on Law, tabled on 9 July 2020: «*A letter rogatory is the privileged procedural tool of mutual legal assistance allowing the prosecution of transnational offenses such as cybercrimes. For a judge, a letter rogatory entrusts any judicial authority of another State with the task of proceeding on his behalf. In investigations or other judicial actions, it covers any investigative act, witnesses, searches and seizures or even the arrest of suspects. A letter rogatory thus makes it possible in theory to overcome the transnational difficulties. However, the letter rogatory process is a cumbersome procedure with long response times. Thus it is a slow tool compared to the speed at which cybercrimes are executed and the volatility of digital evidence. The letter rogatory process has two main limitations. The first relates to the subordination of letters rogatory to the existence of bilateral or multilateral agreements between states (...) The second limit relates to the difficulties linked to the scope of letters rogatory.*»

112. Sherpa, "Regulating Transnational Companies, 46 Proposals", *op. Cit.*, Proposal n°20, p.46.

113. *Ibid.*, Proposal n°43, p.70.

114. Law n° 2011-1862 of 13 December 2011 on the distribution of litigation and the simplification of certain jurisdictional procedures; Decree n° 2013-960 of 25 October 2013 creating a central office fighting corruption and financial and tax offences; Law No. 2013-1117 of 6 December 2013 on the fight against tax fraud and serious economic and financial crime and Organic Law No. 2013-1115 of 6 December 2013

on the Financial Public Prosecutor; Law No. 2020-1672 of 24 December 2020 on the European Public Prosecutor's Office, environmental justice and specialized criminal justice.

115. Christiane Taubira, «Prologue», Michel Hunault éd., *La Lutte contre la corruption, le blanchiment, la fraude fiscale.* Presses de Sciences Po, 2017, pp. 9-16: "*Legislating against corruption is the first condition to fight against this purulent notch to our democracies' general interest. Still, we must ensure that the legislative provisions are effective and efficient. There were periods of voluntary impotence. (...) Those times are over. At least they must and can be if we have the courage to make it a public debate and information topic. In full light. Notwithstanding the arrangements which, despite all beliefs, never go unnoticed, such as those currently being played between Switzerland and France on banking secrecy, a pretty name to protect tax delinquents. Telling and debating. "Because knowledge draws the outline of things with greater rigor, as the sun does at the highest point of its trajectory", said Walter Benjamin.*" (Our translation).

116. Aude Solveig-Epstein, «La comptabilité du droit d'accès aux informations environnementales de source privée avec la protection du secret des affaires : prélude à la consécration d'un droit d'accès aux données d'intérêt général de source privée», *Revue juridique de l'environnement,* 2020, vol. 45, pp. 137-149.

117. *French Consumer Code* – Art. L. 113-1 et L. 113-2.

118. Legislative proposal nº 675 transposing the Directive of the European Parliament and of the Council on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, Amendment n°CL32, tabled on 16 March 2018 - Rejected "*This amendment, proposed by a collective of NGOs, associations and trade unions, intends to circumscribe the scope of this proposed law to the spirit of the European directive, i.e. to protect information obtained, used and disclosed by companies that would unduly benefit from investments made by others in an exclusively competitive context.*" see also in this sense Amendment No. LC8. (Our translation).

119. *Code of Criminal Procedure* - Art. 689-11.

120. *Criminal Code* - Art. 113-6 and 113-7.

121. *Criminal Code* - Art. 113-5.

122. Sherpa, "Regulating Transnational Companies, 46 Proposals", *op. cit.*, Proposal n° 25, p. 52.

123. Law No. 2016-1691 of 9 December 2016 on transparency, the fight against corruption and the modernisation of economic life, Article 21.

124. Law No. 2018-898 of 23 October 2018 on the fight against fraud, Article 36.

125. Evelyne Bonis, « Synthèse procédure pénale en droit des affaires », *JCl. Pénal des Affaires,* LexisNexis, 2020, pp. 8 - 9 ; Stéphane Detraz, JCl. Pénal des affaires, V° Impôts, fasc. 40, n° 179 et s.

126. Ordinance No. 2019-963 of 18 September 2019 on the fight against fraud affecting the financial interests of the European Union through criminal law, Article 1.

127. Article 24 of Law No. 2020-936 of 30 July 2020 added a second paragraph to Article 113-5, according to which French criminal law is "*also applicable to the acts of complicity provided for in the second paragraph of Article 121-7 committed on the territory of the [French] Republic and concerning, when committed abroad, the crimes provided for in Title II*" (Our translation). According to the explanatory memorandum to the law, this addition is intended to "*facilitate the punishment of acts of complicity referred to in the second paragraph of Article 121-7*" (Our translation). Thus, "*it is proposed to specify that French criminal law is applicable to them when they are committed on the territory of the [French] Republic (without the requirement of double criminality and conviction by a foreign court), but also when they are committed abroad, provided that they concern a crime against the person.*" (Our translation) ; see also Marc Segonds, «*La nouvelle rédaction de l'article 113-5 du code pénal. A propos de la loi n°2020-936 du 30 juillet 2020 visant à protéger les victimes de violences conjugales*», Dalloz, RSC, 2020, p.982..

128. The Constitutional Council has recognised that the protection of the environment is an objective of constitutional value and that, as such, "*the legislator is justified in taking into account the effects that activities carried out in France may have on the environment abroad*" (Constitutional Council, Decision No. 2019-823 QPC of 31 January 2020, Union des industries de la protection des plantes [Prohibition on the production, storage and circulation of certain phytopharmaceutical products.]) (Our translation).

129. Étienne Pataut , «Déni de justice et compétence internationale» (Soc. 14 sept. 2017, nos 15-26.737 et 15-26.738, D. 2017. 1836 ; *ibid.* 2018. 966, obs. S. Clavel et F. Jault-Seseke), *Revue critique de droit international privé,* 2018/2 (N° 2), p. 267-279.

130. Regulation (EC) No. 864/2007 of the European Parliament and of the Council on 11 July 2007 on the law applicable to non-contractual obligations ("Rome II").

131. Olivera Boskovic, « Brèves remarques sur le devoir de vigilance et le droit international privé », D. 2016. 385 ; Étienne Pataut, « Le devoir de vigilance. Aspects de droit international privé », Dr. soc. 2017. 833 ; Horatia Muir Watt, « Devoir de vigilance et droit international privé: le symbole et le procédé de la loi du 27 mars 2017», *Rev. internat. de la compliance et de l'éthique des affaires,* suppl. JCP E 2017. 91.

132. Marc Segonds, «Ordonnance n° 2019-963 du 18 septembre 2019 relative à la lutte contre la fraude portant atteinte aux intérêts financiers de l'Union européenne au moyen du droit pénal», *Dalloz, RSC* 2019 p.890 : "*On the other hand, by neutralising in this way the conditions attached to the active personality principle as well as those attached to the French law jurisdiction in the presence of an accomplice on the national territory of an offence committed abroad, the need will necessarily arise (one day) for the pure and simple abolition of such conditions, which constitute so many obstacles to the repression of international corporate offences.*" (Our translation).

133. Article 7 of the Rome II Regulation provides that "*The law applicable to a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage shall be the law determined pursuant to Article 4(1), unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred*". It might then be necessary to clarify that corporate policies of parent companies can constitute events giving rise to damage within the meaning of the Regulation.

134. Étienne Pataut, «Déni de justice et compétence internationale (Soc. 14 sept. 2017, nos 15-26.737 et 15-26.738, D. 2017. 1836 ; ibid. 2018. 966, obs. S. Clavel et F. Jault-Seseke)», *op. cit.*

135. Manuel Carius, «Les *revolving doors* au sein de la fonction publique» , *AJDA* 2020. 1470: "*For more than fifty years, Anglo-Saxon economists have developed the theory of 'regulatory capture', popularised by George Stigler in 1971, according to which the regulator of an economic activity can find itself subject to the pressure group constituted by the companies in the sector in question, within the framework of an exchange of 'reciprocal favours'*" (our translation) ; Bertrand Badie et al., *Qui gouverne le monde ?,* La Découverte, «État du monde», 2018, 392 p.

136. Shoshana Zuboff, *L'Âge du capitalisme de surveillance, Zulma,* Essais, 15 October 2020, 856 p.

137. Dominique Plihon, «Quel pouvoir à l'ère de la mondialisation ?», in Bertrand Badie et al., *Qui gouverne le monde ?,* La Découverte, «État du monde» 2018, pp. 105 à 117.

138. MSI Integrity, "Not Fit-for-Purpose: The Grand Experiment of Multi-Stakeholder Initiatives in Corporate Accountability, Human Rights and Global Governance", *op. cit.*; Renaud Fossard, *Big Corpo: Encadrer la pub et l'influence des multinationales : un impératif écologique et démocratique, op. cit.*

139. Stéphane Horel, «18. Bruxelles, capitale du lobbying à ciel couvert», in Bertrand Badie et al., *Qui gouverne le monde ?* La Découverte, 2018, pp. 231-238.

140. Michel Clamen, «Lobbying : de l'histoire au métier», *Géoéconomie*, vol. 72, no. 5, 2014, pp. 165-182 ; Jean-Marc Décaudin, «ENTREPRISE - Communication d'entreprise», *Encyclopædia Universalis* ; Justine Canonne, «Le lobbying», *Sciences Humaines,* vol. 326, no. 6, 2020, pp. 13-13 ; Olivier Petitjean & Lora Verheecke, *Les Sages sous influence? La lobbying auprès du Conseil constitutionnel et du Conseil d'État,* Amis de la Terre, Observatoire des multinationales, June 2018.

141. Renaud Fossard, *Big Corpo: Encadrer la pub et l'influence des multinationales : un impératif écologique et démocratique, op. cit.,* p.54 et 181 ; see also, Sylvain Laurens, *Les courtiers du capitalisme. Milieux d'affaires et bureaucrates à Bruxelles.* Agone, 2015, which refers to lobbying as a "*system of social relations that structurally and durably keeps a large proportion of citizens out of political decisions.*" (Our translation).

142. Manuel Carius, «*Les revolving doors* au sein de la fonction publique», *AJDA*, n°26, 27 July 2020, p. 1470.

143. Justine Canonne, «Le lobbying», *op.cit.*; Aurore Gorius, «Dans les soupentes du pouvoir», *Les Jours*, June 2017.

144. Stéphane Foucart & Stéphane Horel, «Glyphosate : révélations sur les failles de l'expertise européenne», *Le Monde*, 27 November 2017; Rachel Tansey, «*Tirées d'affaires ? Le lobbying des multinationales contre une législation européenne sur le devoir de vigilance*», Corporate Europe Observatory (CEO), Les Amis de la Terre Europe et France, L'European Coalition for Corporate Justice (ECCJ), June 2021.

145. Lobbying is a form of capturing the public decision that is exercised further upstream than corruption: it targets the normative process while corruption targets the public decision to execute the law. In reality, they are two sides of the same coin, the effective exercise of the former ultimately rendering the latter useless. See in this sense, Nauro F. Campos and Francesco Giovannoni, "Lobbying, Corruption and Political Influence", *Public Choice,* vol. 131, no. 1/2, 2007, pp. 1–21.

146. Guillaume Courty & Marc Milet, « Moraliser au nom de la transparence. Genèse et usages de l'encadrement institutionnel du lobbying en France (2004-2017) », *Revue française d'administration publique,* vol. 165, no. 1, 2018, pp. 17-31; Cécile Robert, «La politique européenne de transparence (2005-2016) : de la contestation à la consécration du *lobbying*. Une sociologie des mobilisations institutionnelles, professionnelles et militantes autour des groupes d'intérêt à l'échelle européenne», *Gouvernement et action publique,* vol. 6, no. 1, 2017, pp. 9-32.

147. The provisions are inserted in Title II of Law No. 2016-1691 of 9 December 2016 on transparency, the fight against corruption and the modernisation of economic life («Sapin II»), entitled "On the transparency of relations between interest representatives and public authorities (Articles 25 to 33)."

148. Law No. 2016-1691 of 9 December 2016 "Sapin II" - Art. 25 ; Decree No. 2017-867 of 9 May 2017 on the digital directory of interest representatives.

149. Jean-Louis Nadal, *Renouer la confiance publique,* proposal n°11, 2015, p.77.

150. Haute Autorité pour la Transparence de la Vie Publique (HATVP), *Rapport d'activités 2020,* June 2021.

151. Dalloz, Fiches d'orientation, Pantouflage (Fonction publique) - September 2020.

152. Law No. 2013-907 of 11 October 2013 on the transparency of public life.

153. Law No. 2019-828 of 6 August 2019 on the transformation of the public service.

154. Autorité des Marchés Financiers (AMF), D*e nouvelles personnalités font leur entrée à la Commission des sanctions,* 9 September 2021 ; Sherpa, *Signalement de Total à l'AMF en matière de risques climatiques,* Press release, 28 May 2020.

155. Group of States against Corruption (GRECO), *Preventing corruption and promoting integrity in central governments (top executive functions) and law enforcement agencies, Evaluation Report - France,* GrecoEval5Rep(2019)2, 84th Plenary Meeting, Strasbourg, 2-6 December 2019 : "*GRECO recommends that (i) persons with top executive functions be required to disclose on a regular basis details of the lobbyists they meet and the topics discussed; (ii) all lobbyists who enter into contact with public officials (in particular, persons with top executive functions), regardless of whether they themselves initiated the contacts, be required to register on the register of lobbyists.*"

156. Bertrand Dautzenberg, «Le lobbying du tabac en France», *Les Tribunes de la santé*, vol. 39, no. 2, 2013, pp. 63-68.

157. United Nation Human Rights Council, *Report of the Special Rapporteur in the field of cultural rights,* A/69/286, 8 August 2014, p. 10 § 38: "*Commercial advertising, not least that of large corporations, is not neutral in terms of the values, world visions and aspirations it promotes.*"

158. Christine Leteinturier, «PUBLICITÉ», *Encyclopædia Universalis* ; Stéphane Foucart, Stéphane Horel & Sylvain Laurens, *Les gardiens de la raison. Enquête sur la désinformation scientifique,* Paris, La Découverte, 2020; Erik Conway & Naomi Oreskes, *Les marchands de doute,* éd. Le Pommier, coll. «Essais et documents», Paris, 2012.

159. United Nation Human Rights Council, *Report of the Special Rapporteur in the field of cultural rights, op. Cit.,* p. 8 § 29: "*In the past, advertising was mainly informative. That changed in the 1920s and today much contemporary advertising focuses on the link between emotional responses and decision-making, benefiting from advances in behavioural sciences and playing on subconscious desires.*"; Benjamin Kessler & Steven Sweldens, «Think You're Immune to Advertising ? Think Again», 30 Jan. 2018.

160. Christine Leteinturier, «PUBLICITÉ», *Encyclopædia Universalis, op. cit., "The implementation of advertising techniques and promotional strategies represents a rather high cost for advertisers, and they expect direct «benefits» (increase in sales or launch of a new product) or indirect benefits (image effect, increase in notoriety).*" (Our translation).

161. Renaud Fossard, *Encadrer l'influence politique des entreprises sur l'opinion publique, Ritimo.org,* 20 September 2021; Irina Lock & Peter Seele, "Politicized CSR: How corporate political activity (mis-) uses political CSR", *Journal of Public Affairs,* 14 August 2017, 18(2) 1667.

162. Mathias Reymond, «17. Managers d'opinion : qui contrôle les médias ?», Bertrand Badie éd., *Qui gouverne le monde ?* La Découverte, 2018, pp. 223-230. ; Julia Cagé & Benoit Huet, *L'Information est un bien public - Refonder la propriété des médias*, Seuil, 2021, 264 p.; Alexis Delcambre, «HSBC joue l'arme de la publicité face aux « articles hostiles », *Le Monde,* 23 February 2015; Noam Chomsky, *La fabrication du consentement. De la propagande médiatique en démocratie,* trad. de Guillaume Villeneuve, Marseille, Agone, 2008, 672 p.

163. La Quadrature du net, *Les coûts sociétaux de la publicité en ligne,* 6 December 2020 ; Wolfie Christl, *Corporate Surveillance in Everyday Life: How Companies Collect, Combine, Analyze, Trade, and Use Personal Data on Billions, Cracked Labs,* June 2017.

164. Law No. 79-1150 of December 29, 1979 on advertising, signs and pre-signs; Law No. 86-1067 of September 30, 1986 on freedom of communication (Loi Léotard); Law No. 91-32 of January 10, 1991 on the fight against smoking and alcoholism (Loi Evin); Law No. 2016-1771 of December 20, 2016 on the elimination of commercial advertising in youth programs on public television (Loi Gattolin).2016 relative à la suppression de la publicité commerciale dans les programmes jeunesse de la télévision publique (Loi Gattolin).

165. Sherpa, "Regulating Transnational Companies, 46 Proposals", op. cit., Proposal n° 17, p. 42.

166. Law no. 2019-486 of the 22nd of May 2019 on enterprise growth and transformation ; Assaël Adary, «Loi PACTE: une opportunité pour les entreprises... et leurs communicants», *op. cit.*

167. Sherpa, *Auchan et le Rana Plaza : plainte pour pratiques commerciales trompeuses* ; Reporters Sans Frontières (RSF), *RSF dépose plainte contre Facebook en France pour "pratiques commerciales trompeuses"*, 22 March 2021 L'UFC-Que choisir porte plainte contre McDonald's pour des «pratiques commerciales trompeuses» *visant les enfants*, Le Monde, 13 October 2021.

168. Karim Benyekhlef, « Droit global : un défi pour la démocratie», *Revue Projet* 2016/4 (N° 353), pp. 14 à 22.

169. CNCDH, *La responsabilité des entreprises en matière de droits de l'homme - Nouveaux enjeux, nouveaux rôles, op.cit.*; MSI Integrity, «Not Fit-for-Purpose: The Grand Experiment of Multi-Stakeholder Initiatives in Corporate Accountability, Human Rights and Global Governance», *op. cit.*

170. ONU, *Principes directeurs relatifs aux entreprises et aux droits de l'homme,* 2011, voir notamment, « III. Accès à des voies de recours ».

171. Sherpa, "Regulating Transnational Companies, 46 Proposals", *op. cit.*, Proposal n°42, p. 69.

172. Christophe Clerc, Julie Klein, Béatrice Parance, «Table Ronde: La Gouvernance durable», *Cahiers de droit de l'entreprise,* n° 5, September - October 2021, p. 9 : «*De façon générale, les PCN n'ont ni pouvoir d'inspection, ni pouvoir de sanction. Dans la moitié des cas, leur intervention est un échec (V. TUAC, Trade Union Input to the « OECD Guidelines Stocktaking Exercise - First Draft Report », Paris, 20 May 2021). Après 36 ans d'existence, le bilan est maigre. D'où la question : leur création a-t-elle été une étape positive ou le cache-sexe de l'impuissance d'un système mondial de régulation, impuissance voulue et organisée par certains États qui en bénéficient ? Une chose est sûre, en l'état, les PCN ne sont pas à la hauteur des enjeux.*»; Swann Bommier, « Responsabilité environnementale des entreprises et régulation extraterritoriale : l'implantation de Michelin en Inde à l'épreuve des Principes directeurs de l'ocde. » *Études internationales,* vol. 47, n°1, March 2016, p. 107–130; Caitlin Daniel, Joseph Wilde-Ramsing, Kris Genovese & Virginia Sandjojo, *Remedy remains rare: An analysis of 15 years of NCP cases and their contribution to improve access to remedy for victims of corporate misconduct,* OECD Watch, June 2015, 55 p; Sherpa, *Boycott : email adressé au Point de Contact National de l'OCDE,* February 2020.

173. CCFD Terre solidaire, Sherpa & CGT, *Usine Michelin en Inde : les plaignants dessaisissent le Point de contact national de l'OCDE,* Press release, 24 September 2013; Tribune collective, « Champs d'éoliennes d'EDF : des populations mexicaines dénoncent la violation de leurs droits fondamentaux », *L'Obs,* 16 October 2019; Avocats Sans Frontière (ASF), *Retrait de la procédure devant le PCN français,* Press release, March 2021.

174. Sherpa, *Huile de palme au Cameroun : le groupe Bolloré attrait en justice,* Communiqué de presse, 27 May 2019; Camille Loyer, Swann Bommier, Cannelle Lavite & Guillermo Torres, *Vigilance hors-tension: violations des droits humains au Mexique, quelles responsabilités pour EDF et l'Agence des participations de l'Etat,* CCFD-Terre solidaire, ECCHR, ProDESC, 10 June 2021, 49 p.

175. William Bourdon, «De nouvelles infractions sont à créer», Propos recueillis par Jean Merckaert, Revue Projet 2016/4 (N° 353), pp. 52 à 58 «*Surtout, de plus en plus, le soft law fabrique du hard law, car les juges en tiennent compte comme critère pour apprécier si l'entreprise s'acquitte ou non de ses obligations, en matière de sécurité par exemple. Le raisonnement est le suivant : « Vous avez décidé unilatéralement de prendre des engagements publics, alors que personne ne vous y a contraint ! »* Ainsi, dans le cas de l'Erika, le cynisme de Total a pesé sur les magistrats, qui, même s'ils ne l'ont pas écrit explicitement, ont constaté un grand écart entre les engagements pris en matière de développement durable et la réalité des choix effectués par les entreprises.»

176. Mathilde Dupré, *Quand les accords de commerce minent la capacité des États de répondre aux urgences écologiques et sociales*, *Ritimo.org*, 20 September 2021.

177. Xavier Becquey, «Il faut enraciner les enjeux éthiques au sein de l'entreprise», Interview by Jean Merckaert, Revue Projet 2016/4 (N° 353), pp.30-35 «*Why should our societies penalise murders, if public disapproval were to suffice? A company is a group of men and women who put themselves at the service of a project. And I strongly believe in the ability of companies to create, to take risks, to experiment, to make mistakes... Which implies freedom of action. But the law must say what is acceptable and what is not, and ensure that companies respect everyone's rights, collective rights and those of the weakest. (...) Companies are a power. And any power, in order not to become predatory, must have limits. This is of course the ethical view of the company on its action, but also the role of the law*». (Our translation).

178. Declaration on Human Rights Defenders, adopted by UN General Assembly resolution A/RES/53/144, 8 March 1999 ; Council of Europe and European Court of Human Rights (ECHR), *Les organisations non gouvernementales dans la jurisprudence de la Cour européenne des droits de l'homme,* Research report, 2016 ; The report cites in particular the ECHR judgment, Vides Aizsardzības Klubs v. Latvia, no. 57829/00, 27 May 2004, which describes associations as "*watchdogs of democracy*" in the same way as journalists.

179. L.A. Coalition, «*Une citoyenneté réprimée*, an inventory of the obstacles to associative actions in France», Report, 5 October 2020.

180. Global Witness, *Last line of defence, The industries causing the climate crisis and attacks against land and environmental defenders*, September 2021.

181. Antoine Buyse, "Squeezing civic space: restrictions on civil society organizations and the linkages with human rights",*The International Journal of Human Rights,* 2018, 22:8, p. 966-988 ; Council of Europe, «Renforcement de la liberté d'association dans les états membres du conseil de l'Europe», 2019 ; Amnesty International, Rapport 2020/21: La situation des droits humains dans le monde, 7 April 2021, p. 56 et p. 212 ; L.A. Coalition, *Synthèse d'analyse du projet de loi renforçant les principes républicains, dite « projet de loi séparatisme »*, March 2021.

182. Report of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 8 September 2015, A/70/361, p.13 : "*For the purposes of the present report, a whistle-blower is a person who exposes information that he or she reasonably believes, at the time of disclosure, to be true and to constitute a threat or harm to a specified public interest, such as a violation of national or international law, abuse of authority, waste, fraud, or harm to the environment, public health or public safety.*" ; United Nations Convention Against Corruption - Art. 33 : "*any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention*" ; Council of Europe's Parliamentary Assembly, Protection of "whistle-blowers", Resolution 1729 (2010), 29 April 2010, §1: "*individuals who sound an alarm in order to stop wrongdoings that place fellow human beings at risk*".

183. Jean-Pierre Mignard & Ivan Terel, «Les lanceurs d'alerte, agents actifs de la politique criminelle», in *Politique(s) criminelle(s)*. Mél. en l'honneur de Christine Lazerges: Paris, Dalloz, 2014, p. 729; Danièle Lochak «L'alerte éthique entre dénonciation et désobéissance», *L'Actualité juridique*, Droit administratif, Dalloz, 2014.

184. William Bourdon, «De nouvelles infractions sont à créer», *op. cit.*: "*Relying on whistleblowers is not a resignation. It is an absolute necessity when only insiders can open the door. They must be given greater protection. (...) Their action at the forefront of the defence of the general interest shows a desire, if not to reverse, at least to reduce the asymmetry with private actors. They are the extreme expression of a new responsibility, shared by all the actors on the planet.*" (Our translation).

185. Maison des lanceurs d'alerte (MLA), *Lettre ouverte au Président Tshisekedi: annulez la condamnation à mort des lanceurs d'alerte congolais*, 25 March 2021;

Sébastien Schehr, «L'alerte comme forme de déviance: les lanceurs d'alerte entre dénonciation et trahison», *Déviance et société*, 2008/2, vol. 32, pp. 150-151.

186. Conseil d'État, *Le droit d'alerte: signaler, traiter, protéger*, *la Documentation française*, 25 February 2016.

187. Sherpa, "Regulating Transnational Companies, 46 Proposals", *op. cit.*, Proposition n°37, p.66.

188. Law No. 2016-1691 of 9 December 2016 on transparency, the fight against corruption and the modernisation of economic life (known as "Sapin II") - Articles 6 to 15 ; this regime was specified by Decree No. 2017-564 of 19 April 2017 on the procedures for collecting alerts issued by whistleblowers within legal persons under public or private law or State administrations.

189. Law No. 2016-1691 of 9 December 2016 «Sapin II» - Art. 6, paragraph 1 "*A whistleblower is a natural person who discloses or reports, disinterestedly and in good faith, a crime or misdemeanour, a serious and manifest violation of an international commitment duly ratified or approved by France, of a unilateral act of an international organisation taken on the basis of such a commitment, of the law or of the regulations, or of a serious threat or prejudice to the general interest, of which he or she has personal knowledge.*" (Our translation).

190. Criminal Code - Art. 122-9 - "*A person who breaches a secret protected by law shall not be criminally liable, provided that such disclosure is necessary and proportionate to the safeguarding of the interests in question, that it takes place in compliance with the reporting procedures defined by law and that the person meets the criteria for the definition of a whistleblower provided for in Article 6 of Law No. 2016-1691 of 9 December 2016 on transparency, the fight against corruption and the modernisation of economic life.*" (Our translation).

191. Law No. 2016-1691 of 9 December 2016 «Sapin II» - Art. 8.

192. Law No. 2016-1691 of 9 December 2016 «Sapin II» - Art. 6, paragraph 2 "*Facts, information or documents, whatever their form or support, covered by national defence secrecy, medical secrecy or the secrecy of relations between a lawyer and his client are excluded from the whistleblowing regime*" defined by this chapter (our translation) ; Jean-Philippe Foegle, « De Washington à Paris, la « protection de carton » des agents secrets lanceurs d'alerte », *La Revue des droits de l'homme,* Actualités Droits-Libertés, 4 June 2015 ; Défenseur des droits, Rapport annuel d'activités 2018, March 2019.

193. Maison des Lanceurs d'alerte (MLA), *Lettre ouverte à Emmanuel Macron sur le statut des lanceurs d'alerte*, 7 November 2019.

194. George W. Pring & Penelope Canan, «Strategic Lawsuits Against Public Participation («SLAPPs»): An Introduction for Bench, Bar and Bystanders», 12 *Bridgeport L.* Rev. 937, 1992.

195. Numerous lawsuits have been brought for defamation (in French law, provided for and incriminated by Articles 23 paragraph 1, 29 paragraph 1 and 32 paragraph 1 of the law of 29 July 1881 on the freedom of the press) against journalists, associations or even academics (Denis Mazeaud & al., «Rapport sur les procédures bâillons», written at the request of Mr Thierry Mandon, Secretary of State for Higher Education and Research, Dalloz, 2017.), but also for commercial denigration (CA Paris (pôle 1, ch. 2, 23 February 2017), trademark infringement (Cass. com, 8 Apr. 2008, No. 06-10.961; Cass. civ. 1, 8 Apr. 2008, No. 07-11.251 Cass. civ. 2, 19 Oct. 2006, No. 05-13.489), or for infringement of certain secrets (T. Com, 22 January 2018, Conforama).

196. Thomas Despierres, «Typologie des procédures- bâillons», Le débat d'intérêt général contre les procédures- bâillons, CRID, 2017 ; EU-CITZEN, SLAPP in the EU Context, Ad-Hoc Request, Petra Bárd, Judit Bayer, Ngo Chun Luk & Lina Vosyliute, coordinated par Sergio Carrera, 29 May 2020 ; Sandrine Fontaine, Simon Savry-Cattan and Cécile Villetelle, *Les poursuites stratégiques altérant le débat public,* Rapport Clinique de l'Ecole de Droit de Sciences Po, 2018 ; Oscar Reyes, *Sued into silence,* Greenpeace Europe, July 2020 ; see also TGI, 17th Chamber, 6 February 2015, Garigou v. Société Fiducial: notes the existence of a SLAPP with the aim of "*obstructing the proper exercise of the freedom of expression which, in a democratic system, a qualified person such as he is must be able to enjoy in the context of a debate of general interest.*" (Our translation).

197. Denis Mazeaud, «*La procédure bâillon constitue une atteinte à la liberté d'expression*», *La Gazette du Palais*, 14 November 2017; Juliette Leroux, Julie Lalloue & Diana Cristancho, *Secret des affaires et procédures stratégiques*, Guide pratique, Clinique Euclid, Université de Nanterre, 2019.

198. Roderick A. Macdonald, Pierre Noreau and Daniel Jutras, *Les poursuites stratégiques contre la mobilisation publique – les poursuites-bâillons (SLAPP)*, *Rapport du comité au ministre de la Justice*, Québec, 15 March 2007.

199. Anne-Marie Voisard, «Poursuites-bâillons : la liberté d'expression en procès », C.E.R.A.S, Revue Projet, 2016/4 N° 353, pages 59 à 64 "*If the 17th chamber of the Paris Court of First Instance is considered to be more liberal in terms of freedom of expression, the fact remains that the fear of the human and financial costs of defending oneself in court is likely to dissuade anyone from exposing oneself to this kind of risk. That is the whole point of punishing the few: to obtain the silence of the many.*" (our translation) ; Anne MOREAUX, Secret des sources VS Secret des affaires : télescopage entre démocratie et compétitivité, *Affiches parisiennes,* 13 September 2019 ; "*Even rehabilitated, the procedure you underwent anyway because the aim is to break your knees financially, to keep you busy and to save time," denounces Vincent Charmoillaux, secretary general of the Syndicat de la magistrature. "The problem is not in the outcome of the procedure but in the procedure itself. This trend creates serious violations of public freedoms because there are no sufficient guarantees to avoid the use of these procedures, which are doomed to failure, by actors acting in bad faith," the magistrate said.*" (Our translation).

200. Sandrine Fontaine, Simon Savry-Cattan & Cécile Villetelle, Les poursuites stratégiques altérant le débat publique, *op. cit.*; see also Public Participation Project, "State Anti-SLAPP Laws".

201. Dr Justin Borg-Barthet, *Advice concerning the introduction of anti-SLAPP legislation to protect freedom of expression in the European Union*, ECPMF, 19 May 2020.

202. European Court of Human Rights, *Les organisations non gouvernementales dans la jurisprudence de la Cour européenne des droits de l'homme, op. cit.*

203. Code of Criminal Procedure - Art. 1, paragraph 1 and 31.

204. Code of Criminal Procedure - Art. 1, paragraph 2.

205. Code of Criminal Procedure - Art. 2.

206. Unlike prosecutors, who do not enjoy the same guarantees of independence as judges. Indeed, the Minister of Justice can issue general directives on criminal policy to public prosecutors and prosecutors of the Republic, in accordance with Article 30 of the Code of Criminal Procedure. Moreover, the career of a prosecutor depends on their hierarchy, which led the European Court of Human Rights to state in 2010 that the French prosecutor is not "*an independent judicial authority*".

207. Prosecutors are hierarchically subordinate to the Minister of Justice; indeed, OECD reviewers noted in relation to the fight against corruption in France "*the quasi-monopoly enjoyed by the prosecution service in initiating investigations and prosecutions (...). In these circumstances, and given the large number of allegations of bribery of foreign public officials that have not led to the opening of any investigation, even a preliminary one, they are deeply concerned about the lack of independence of the prosecutor's office on which the European Court of Human Rights has clearly ruled and on which the French Court of Cassation has also taken a position*" in OECD, «Rapport de phase 3 sur la mise en œuvre par la France de la Convention de l'OCDE sur la lutte contre la corruption», October 2012. (Our translation).

208. See, in particular, the fight against corruption: "*Corruption offences have the particularity of not having direct victims or of not allowing victims to know that they are victims. This is the case when a company bribes a public decision-maker in order to obtain a contract, and the competitors who have been ousted can hardly know the real reason for their ouster. In this case, the possible inaction of the public prosecutor's office when informed of such facts cannot therefore be counterbalanced by the civil action brought by the victim. This situation is the cause of suspicions sometimes expressed about the real will of the justice system and the Government to see corruption acts effectively prosecuted and punished, in particular when they concern elected officials*", Report made on behalf of the Law Commission by Mr Yann Galut, MP, registered on 12 June 2013, page 30. (Our translation).

209. Creation of Article 2-1 of the Code of Criminal Procedure habilitating associations against racism by Law No. 72-546 of 1 July 1972 on the fight against racism.

210. Assemblée nationale, Office parlementaire d'évaluation de la législation, *Rapport n°1583 sur l'exercice de l'action civile par les associations*, Pierre Albertini, 11 May 1999; see also Tribunal de grande instance de Paris, 10th correctional chamber, Request for opinion No. 1200015: "*From a technical point of view, the above-mentioned legislative provisions do not regulate in a perfectly uniform manner the conditions for the empowerment of associations and its effects.*" (Our translation).

211. Law No. 2013-1117 of 6 December 2013 *on the fight against tax fraud and serious economic and financial crime;* Included in Article 2-23 of the CCP following the Cahuzac affair, the legislative authorisation in the realm of corruption has the particularity of requiring associations to obtain prior executive approval, issued by the Minister of Justice. Decree No. 2014-327 of 12 March 2014 on the conditions for approval of anti-corruption associations with a view to exercising the rights recognised to the civil party, Article 1 "*a sufficient number of members", "the disinterested and independent nature of its activities", "during the years of its existence, effective and public activity with a view to combating corruption.*" (Our translation).

212. Roni Gocer, «Prière de ne pas déranger», *Politis*, n°1637, du 21 au 27 January 2021; Pierre Maurer, «*Inquiétude autour de l'avenir d'Anticor: «C'est scandaleux !», dénoncent des sénateurs de gauche», Public Sénat*, 11 February 2021.

213. Laurent Radisson, «Action en justice des associations: le coup de frein de la Cour de cassation», *Actu-environnement*, September 2020.

214. For a time, the Court of Cassation allowed associations to bring civil actions in defence of their statutory object on one or other of these grounds. Cass Crim, 14 January 1971, 70-90.558, published in the bulletin; Cass Crim, 7 Feb. 1984, n°82.90338, published in the bulletin; Cass Crim, 29 Apr. 1986, n° 84.93719; Cass Crim, 12 September 2006, 05-86.958, published in the bulletin; Cass. Crim. 9 Nov. 2010 n° 09.88272; More recently, the decisions of the Court of Cassation have refused the possibility for associations to bring a civil action on this general basis of article 2 of the Code of Criminal Procedure: Cass. Crim, 11 Oct. 2017, n° 16-86868, published in the bulletin; Cass. Crim. 31 Jan. 2018, 17-80.659, published in the bulletin; Cass. Crim. 8 Sept. 2020, n°19-84.995, published in the bulletin.

215. Raphaële Parizot, «Fondement à la recevabilité de la constitution de partie civile d'une association de lutte contre la corruption: se limiter à l'article 2-23 ou admettre l'article 2 du code de procédure pénale», *RSC* 2018, p. 136; Daniel Soulez Larivière, «*Le parquet public et le «parquet privé»*, *Dalloz Actualité*, 22 January 2018.

216. Cass. Crim. 9 nov. 2010 n° 09.88272.

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