

PUBLIC OPINION, RISK TO REPUTATION: THE ESSENTIALS OF SOCIETAL CORPORATE GOVERNANCE?

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Abstract

Research Question/Issue: This paper will examine the role of reputation regarding corporate governance in terms of performance, risk control and the possible role of legislature or behaviors in this field (in particular with regards to the recent Green Paper “Companies in the EU: a management of governance”, COM (2011) 164 final, of the 5th April 2011, of the European Commission).

Research Findings/Insights: Image, reputation, positive or negative opinion, notoriety of the companies and their managers are regarded as an element of their performance. It is accepted that public opinion, inherently linked to the reputation risk is an essential element of corporate governance. Regarding the need of a long term matter, particularly after the financial crisis, a short period of time is enough to transform a positive public opinion into a negative one. In addition, the assessment of public opinion is complex. Everyone can freely form an “opinion”. The opinion may be private and public. Public opinion refers to society, to citizens and to the people. Its classic means of expression are freedom of the press and freedom of speech. This question is particularly crucial regarding the role of the companies to the “society” as recently defined by the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the committee of the Regions, A renewed EU strategy 2011-14 for Corporate Social Responsibility, the European Commission and the European Parliament (Brussels, 25.10.2011) COM (2011) 681 final).

Theoretical/Academic Implications: How to manage good corporate governance reputation ?As from 1979, the Anglo-Saxon doctrine has acutely highlighted the role of reputation risk regarding corporate governance but what is the situation within the EU? Has legislature, in Europe (and for example, in France), sufficiently acknowledged the concept of reputation risk control? – A long term period seems necessary for efficient corporate governance. Yet, CSR has given an additional power to social and environmental information which may, because it affects a more important spectrum (stakeholders...), cause a more important prejudice, whereas CRS is an "integral part" of corporate governance. Thus, in France, as pointed out in recital 10 of the policy 2006/46/CE but above all, as pointed out in article 53 of the said Grenelle 1 law (n° 2009-967 of the 3rd August 2009), “the quality of information regarding the way in which companies consider the social and environmental consequences of their activity and the access to this information constitutes essential conditions of good corporate governance”. The SRI funds also attempt to control the factors of reputation risk.

Practitioner/Policy Implications: The multiple vehicles of public opinion regarding corporate governance : in fact, CSR, largely consisting in the “reporting” of social and environmental values therefore on “societal communication”, which potentially contains so many possible public opinions to be expressed, may be “additions” to individual opinions. CSR rests on a true discourse which seems, to certain authors, removed from reality: “the reports on corporate social responsibility, summary document between the “say” and “do”, appear as a support of speech which, removed from the real situation, tends first and foremost, to show the “good faith” of organisations. Societal corporate e-governance with the aid of the internet further weakens the concept of societal reputation.

Keywords: Corporate Social Responsibility (CSR), European Union, Corporate Governance, Reputation Risk, Environmental Concerns, Shareholder Activism

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Public opinion and CSR: random but beneficial game of trust and mistrust

Public opinion has prompted historical studies because of its impact on political life², then its role in the social sciences, but this has not been without debate.³ The *fama* has played a role in legal sciences.⁴ Its role has been widely analyzed in these areas. It might therefore seem far removed from business law. Yet the image, reputation and notoriety of companies as well as their leaders are deemed to be part of their performance.

Initially linked to the physical individual and, gradually, to a corporation⁵, to the notion of good or bad reputation, the positive or negative repercussions of public opinion⁶ are undeniable. Good public opinion is built over the long run, yet only a very short time is needed for it to turn into unfavorable public opinion. Everyone can freely have an "opinion"⁷. The opinion can be personal and public. When public, opinion makes reference to society, the citizen, and the people. Its conventional vectors are freedom of the press and freedom to communicate.

However, CSR that is based largely on the "reporting" of social and environmental values, thus on "societal communication," contains the seeds of as many possible public opinion as there are perhaps individual opinions⁸. The Anglo-Saxon doctrine emphasized this in 1979⁹ with great insight. CSR is indeed based on a true discourse that seems, for some writers, to be divorced from reality: "the reports on CSR, the summary document between "saying" it and "doing" it, appear to be the medium for speech which, divorced from the actual situation, is primarily

intended to demonstrate the "good faith" of the organizations"¹⁰. Yet this speech, which is the very essence of communication, can, to the contrary, be the vector of public opinion that can be described as efficient since it is reactive and critical with regard to the accuracy of the "CSR information" shown in these reports.

Public opinion, reputation, awareness, renown

Reputation is a fragile and versatile concept that requires time to build but can be destroyed in a split second. It was durable but already very vulnerable in the eighteenth century¹¹, and it is all the more so in the twenty-first century with the Internet. Public opinion can be expressed quickly or after a certain amount of time. Rarely does a concept that is built over the long term seem so fragile due to the very values that it purports to promote. Moreover, the long term appears to be necessary for efficient corporate governance. In the U.S. this concept is revisited¹² particularly as an essential condition for the granting of compensation. However, CSR has given additional power to the social and environmental information that can, because it affects a larger prism (stakeholders...), cause greater damage, and does so all the more because CSR is an "integral part" of corporate governance. Indeed, as stated in recital 10 of Directive 2006/46/EC, but particularly as stated in Article 53 of the law called Grenelle 1¹³, "the quality of the information on how companies take into account the social and environmental consequences of their business activity and the access to this information are essential conditions of good corporate governance." It is at the intersection of the classical objectives of good corporate management and societal needs, CSR propels the company in the broad sense into corporate governance with the consequences that this produces: public opinion, awareness, risk to reputation, and good (or bad) corporate image.

Is good corporate image a notion of the future? It can be found between the right to honor and the right to privacy, and particularly trade secrets. CSR is particularly suited to an analysis of the scope of the commitments fulfilled and to be fulfilled of

¹ CSR: corporate social responsibility, see special issue of the Journal of Companies, No. 69 October 2009, dir. C. Malecki

² S. Landi, Birth of Public Opinion in Modern Italy. Wisdom of the People and Knowledge of the Government of Machiavelli under the Lights, Rennes, Rennes University Press, 2006; Farge, A., Say Good and Bad. Public Opinion in the 18th Century, Paris, Seuil, 1992.

³ Pg. Bourdieu, Public Opinion does not exist, in Questions of Sociology, Paris, Editions of midnight, 1984, Pgs. 222-235.

⁴ J. Théry, Fama: Public Opinion as Legal Evidence. Overview of the Medieval Revolution of the Inquisition", in B. Lemesle (ed.), Legal Proof from Antiquity to the Present Day, Rennes, PUR, 2003, Pgs. 119-147.

⁵ Especially with the development of the anthropomorphism of corporations and the gradual recognition of corporate holders of Human Rights.

⁶ L. Kaufmann, Public Opinion, in The Dictionary of Human Sciences, Paris, PUF, 2006, Pgs. 833-835.

⁷ No one shall be bothered for his opinions, even religious, provided their manifestation does not disturb the public order established by law," Article 10 of the Bill of Rights of Man and Citizen of 1789.

⁸ See in this sense, Democritus: "There is nothing real, and the views of all is everyone's opinion."

⁹ See the visionary study by James E. Gruning, *A new measure of public opinion of corporate social responsibility*, *Academy of Management Journal* 1979, Vol. 22, No. 4, 738-764, and John Elkington, *Cannibals with Forks: The Triple Bottom Line of 21st Century Business* (The Conscientious Commerce Series) New Society Publishers (September 1, 1998).

¹⁰ The formulation of these "speeches" is essential, see N. Barthe, J.M. Peretti, P. Terramorsi, CSR through the Annual Reports of the CAC 40 Companies, in *Ethics and Social Responsibility*, 78 experts testify, Essays in honor of Michel Joras, coordinated by Françoise de Bry, Jacques Igalens, and Jean-Marie Peretti, Questions of Companies, ed. EMS, Management and Companies, 2010, Pg. 140 and fol., Ps. Pg. 146 and Pg. 148, italics by the authors.

¹¹ A. Farge, *Saying Good and Bad. Public Opinion in the 18th Century*, Paris, Seuil, 1992

¹² Bebchuk, Lucian A. and Fried, Jesse M., *Paying for Long-Term Performance* (December 1, 2009). University of Pennsylvania Law Review, Vol. 158, Pg. 1915-1959, 2010, Harvard Law and Economics Discussion Paper No. 658. Available at SSRN: <http://ssrn.com/abstract=1535355>

¹³ Grenelle I Law, No. 2009-967 of August 3, 2009

companies that engage in social and environmental reporting. This public opinion borne by the stakeholders is the essence of CSR. Public opinion plays a role in building the notion of reputation, which is the opinion and, more technically, the public's social assessment towards a person or entity, group or organization. This is an important factor in many fields such as education, social status, business and corporate performance.

The emergence of a societal reputation, resulting from public opinion but also from the anthropomorphism movement of legal entities linked to the emergence of the corporation's personhood rights, does not however exclude that the leaders¹⁴ are under fire from public opinion and that an index of their reputation based in particular on their post-social mandate compensation be dedicated to them¹⁵. However, CSR that expressly endorses, since the Grenelle II of July 12, 2010¹⁶, the stakeholders¹⁷, sets the stage for a "corporate governance partnership." Such corporate governance takes a broad view of the firm's residual creditors by including all of its stakeholders, translating the concept of stakeholders¹⁸: the shareholders, executives but also the employees, unions, customers and even the suppliers...

CSR, the seedbed of a subjective perception of societal expectations or the back side of a corporate governance partnership

The Grenelle II with the new notions of "societal commitments" introduces the expectations of the stakeholders who come from diverse backgrounds and whose interests must be prioritized. There is no doubt that CSR depends on good communication¹⁹, some will bring up the term "marketing" because they

rightly fear its being reduced to pure communication. But it involves effective management of public relations with the stakeholders²⁰. Thus there are many reasons why CSR is indeed the seedbed of a societal reputation²¹. However, this notion seems to be both fragile, because it can be destroyed in a short time following a societal communication provoking distrust by the NGOs and shackles, since it is built²² over time and can, as such, freeze the company's image in this area. If, for example, a major oil company's shift to wind power or to renewable energy may be greeted positively by the stakeholders, mismanagement of an environmental disaster can suddenly affect said group's "reputational" image. These concepts have been under discussion for some years in management science and give managers a significant advantage over lawyers especially in Anglo-Saxon countries²³.

Psychological dimension of corporate governance or "corporate governance on the couch"

The expectations of consumers, who are stakeholder par excellence, highlight the risks from public opinion, which, by definition, is versatile whereas the notion of societal reputation must be built over the long term²⁴. But CSR contains within itself the ingredients of its success and of its failure as the notion of public opinion takes so much precedence over the traditional issues of corporate governance: the entry of the intuitive and of the almost psychological approach makes it so fragile to the point that it is possible to understand the relationship between public opinion and CSR in this light. Public opinion expresses itself in CSR through a complex manifestation of trust and distrust, which is the result of a good or bad public opinion, which calls firstly for examining the CSR, a vector of public opinion (I)

¹⁴ Particularly their base compensation particularly the variable portion on the CSR indices, 'objective of the Rhodia group to integrate a portion of its 3000 executives' variable compensation in relation to sustainability criteria as part of the Rhodia Way program.

¹⁵ See on this point, the site for the observatory of reputations, <http://www.obs-reputation.org/> proposing a "hit parade" of the boss who has the "best reputation" or "lowest reputation" see also "Risky Business: Reputations Online," This investigation, conducted by an advertising agency, <http://www.webershandwick.com/>, shows that 7 out of 10 business leaders fear for the reputation of their company online. Hence the White Paper on e-reputation; http://portail-despme.fr/resources/Livre_Blanc_ereputation_portaildespme.pdf

¹⁶ Law No. 2010-788 of July 12, 2010 on national commitment to the environment, Official Gazette No 0160 of July 13, 2010 page 12905 text No. 1.

¹⁷ See Supplement No. 4728 of May 20, 2011, The Forum, 7th Symposium on Business Ethics, Stakeholders, these "critical" friends who wish you well?, http://www.Dossier_La_Tribune_Parties_prenantes_110513.pdf

¹⁸ The Anglo Saxons evoke SD: "Stakeholder Dialog".

¹⁹ Dawkins, J. (2004), *Corporate Responsibility: The Communication Challenge*. *Journal of Communication Challenge*, 9(2), 108-119.

²⁰ See Sen, S. and Bhattacharya, C.B. and Korschun, D. (2006). *The Role of Corporate Social Responsibility in Strengthening Multiple Stakeholder Relationships: A Field Experiment*, *Journal of the Academy of Marketing Science*, 34 (2)

²¹ Hill, Ronald Paul, Thomas Ainscough, Todd Shank and Daryl Manullang (2007), *Corporate Social Responsibility and Socially Responsible Investing: A Global Perspective*. *Journal of Business Ethics*, 70(2): 165.

²² Brammer, S. and S. Pavlin, 2004, *Building a Good Reputation*, *European Management Journal*. 22(6): Pg. 704-713.

²³ Fombrun, C., and Shanley, M. (1990). *What's in a Name? Reputation Building and Corporate Strategy*, *Academy of Management Journal*, 33 (2), 233-58; LC Gordon L. and ERW Knight, *Institutional Investors, the Political Economy of Corporate Disclosure, and the Market for Corporate Environmental and Social Responsibility: Implications from the UK Companies Act (2006) 2008 Industry Studies Conference Paper*. Available at SSRN: <http://ssrn.com/abstract=1123550>

²⁴ See Yoon, Y., Gurhan-Canli, Z., and Schwarz, N. (2006). *The Effect of Corporate Social Responsibility (CSR) Activities on Companies with Bad Reputations*. *Journal of Consumer Psychology*, 16(4), 377-90.

and, secondly, public opinion, which is a risk inherent to CSR (II).

1. CSR: VECTOR OF PUBLIC OPINION

The "Discourse on the Method" of CSR

CSR can and is designed in its optimal version as the vector of good public opinion. Indeed, its tools are essentially an audit and its dissemination²⁵ and, more broadly, communication in all its forms. Public opinion may appear to be the sum of the various expectations of stakeholders, who are all individual elements constituting in return good or bad public opinion, and thus a good or bad reputation. While some fifteen years ago shareholders' expectations could be specifically defined (dividend rights, information), CSR diversifies their expectations due to the broad range of societal commitments. CSR also adds a *Manichean dimension* to public opinion because it is intrinsically linked to notions that are fairly vague, and, to some extent, controversial but recurring, of ethics, ecologically-responsible business and eco-citizenry.²⁶

A. Public Opinion: A Response to Stakeholder Expectations

The Progress of the Grenelle II: The "Societal Commitments"

Reputation²⁷ is the fact of fulfilling stakeholders' expectations²⁸. Such an Anglo-Saxon concept of public opinion is based on the concept of "stakeholder Inside" and "Outside"²⁹. It is permissible to draw on these concepts because the Grenelle II, entitled "Law on National Commitment to the Environment,"³⁰ expressly endorses "stakeholders." A "French" or

even "European" CSR is certainly emerging gradually³¹. It develops the concept of corporate "reputational governance." We must recognize that, under the influence of stakeholders, corporate governance is influenced by the "managerial" approach as such is understood in management science. Yet legal issues are sure to arise because there will be a question of responsibilities, of corporate law and of financial law.

A "Societal" Speech that is Difficult to Decipher

The nature of the information and the companies concerned greatly enhances the dissemination of these elements, one of whose features is that they are not always measurable or quantifiable. Thus, Article 225 of the Grenelle II amends Article L. 225-102-1 C. Com. by replacing paragraph 5 with seven paragraphs. The new paragraph 5 Art. L. 225-102-1 C. Com. provides that, in addition to the "information on how the company takes into account the social and environmental consequences of its business activity", the management report must mention "...societal commitments towards sustainable development"³², so many individual or common aspirations to meet...

This "societal discourse"³³ must be legible. However the information is not easily accessible to the layman, particularly concerning "the measures to limit damage to the biological balance, the natural environments, protected animals and plants"³⁴ as well as those relating to the mention of "the societal commitments in favor of sustainable development," which may concern any voluntary approach taken in favor of sustainable development. These data are difficult to measure and quantify, and even to define, and *in fine* to assess, since the approaches can be so different.³⁵ There is a risk that this information is only "lip service"³⁶.

Similarly, new concepts particularly of corporate investment in education, employee training, and disease prevention for example by organizing

²⁵ J. Igalens, Accountability in CSR Matters, Journal of Companies, October 2009, Pg. 34 and fol.

²⁶ See a reference book, in management science, Fred. HM Gertsen, *Riding a Tiger without Being Eaten, How Companies and Analysts Financial Restatements Tame Corporate Reputation and Influence*, 2009, online, [HTTP://REPUB.EUR.NL/RES/PUB/16098/EPS2009171ORG9058922144GERTSEN.PDF](http://REPUB.EUR.NL/RES/PUB/16098/EPS2009171ORG9058922144GERTSEN.PDF), sp. Pg. 67, The Value of Good Corporate Reputation.

²⁷ Fombrun, C.J., 1996, *Reputation: Realizing Value from the Corporate Image*. Harvard Business School Press, Boston.

²⁸ See E. Freeman, 2004, *Strategic Management A Stakeholder Approach*, Pitman, Pg. 46: "any holder of interests, individual or collective, material or symbolic, which may be affected by corporate decisions, but may also exert some power over it" see J. Igalens, S. Point, *Towards Corporate Governance, The Company meet its Stakeholders*, Dunod 2009.

²⁹ See in English corporate law, the taking into account the environment, see Havercroft, Ian and Reisberg, Arad, *Directors' Duties Under the UK Companies Act 2006 and the Impact of the Company's Operations on the Environment*, December 15, 2010. Available at SSRN: <http://ssrn.com/abstract=1274567>

³⁰ Law No. 2010-788 of July 12, 2010 on the national commitment to the environment, Official Gazette No 0160 of July 13, 2010 page text 12905 No. 1.

³¹ See the very interesting study on this point, Habisch, A., Patelli, L., Pedrini, M., Schwartz, C., *Different Talks with Different Folks: A Comparative Survey of Stakeholder Dialog in Germany, Italy, and the U.S.*, *Journal of Business Ethics* (2011) 100: 381-404.

³² I. Desbarats, *The Legal Value of a so-called Socially Responsible Commitment*, JCP ed. E, 2006.1214

³³ Discourse that, in our view, could be part of the extension of the freedom of expression that would be a "fundamental right for the company," See L. Marino, *A Plea for Freedom of Expression, Fundamental Right of the Company*, Rev. trim. dr. com., 2011, No. 1, Pg. 1 and fol.

³⁴ Current Article R. 225-105-2° C. Com.

³⁵ The companies here have the flexibility to organize these efforts, see Ethics and Social Responsibility, 78 expert witnesses, Essays in honor of Michel Joras, in *Questions of Companies*, coordinated by Fr. de Bry, J. Igalens and J.-M. Peretti, eds editions, Management and Company, 2010, Pg. 13 and fol.; P. Deumier, *Sources of Business Ethics*, in *Free Law, Essays Ph. Le Tourneau*, Dalloz 2008, Pg. 337.

³⁶ See J.-G. Martin, *Environmental Transparency and the Responsibility of Parent Companies: The Grenelle II*, Rev. Soc., No. 2, February 2011, Pg. 75 and f., Sp. No. 23 Pg. 78.

sporting events or immunization campaigns, the protection and prevention of nature are all concepts that illustrate the societal commitments towards sustainable development. Such events are increasing at a steady pace. In this sense the "societal" will play a role in public opinion. The stakeholders potentially represent so many public opinions (shareholders, employees, customers, business partners, government, NGOs). The Grenelle II³⁷ thus opens the door wide to public opinion: first by endorsing the concept of "stakeholder" and then by emphasizing the social and environmental information and at the same time on the new and general concept "of societal commitments to sustainable development."³⁸ The latter notion, coming from European works, is vast and opens wide the field of public opinion in this area. As much as the stakeholders will not solely be waiting for concrete answers or reactions in this area, they are also actors in their own expectations as indicated by the term "stakeholders"³⁹, and they are also expressly encouraged to present their "opinion on the approaches to corporate social, environmental and societal responsibility." The dialogue could even continue with the "verification" of the social and environmental information that will be carried out by a new actor, an "independent third party body"⁴⁰ and that will result in a "notice" sent to "the meeting of shareholders or partners"⁴¹. Moreover, the Grenelle II will integrate in the margins of the corporate governance codes many ethical principles and responsible approaches. The key question will naturally be to assess the scope of these so-called socially responsible commitments.⁴²

What expectations?

Once the concept of "the society's expectation" embodied by the concept of stakeholders is presented, the issue may focus specifically on the content of these expectations. Public opinion can turn into vengeance as there are so many expectations. The most unifying themes, which "feed" public opinion

are as follows: the group's carbon footprint, the integration of the environment into the group's product design, social issues, water consumption, protection of the environment in the broad sense (such as disease prevention), financial support for environmental causes, the share dedicated to renewable energy, communication, integrating human rights compliance into the audit programs, global program on diversity..., executive compensation⁴³ and conflicts of interest, diversity, the presence of women on boards of directors and supervisory boards.

Executive compensation is an essential element of the reputation of the leaders at the core of corporate governance...⁴⁴ Stakeholders' expectations regarding CSR (particularly those of NGOs that are heavily involved in the environmental area) will thus be able to feed public opinion in this area. Two concepts will emerge, which result like any public opinion in part from a degree of subjectivity: skepticism and optimism. Moreover, how to limit the skepticism about stakeholders' expectations? This difficulty is related to the management of the intuitive, to the important role of concepts such as "win-win," this is a major difficulty since CSR is a "crossroads issue," nourished by environmental law, corporate and financial law, labor law, and management science. Corporate social "reporting" arouses so many expectations whose themes are very sensitive especially when it comes to demands for equality and fairness: we can mention business agreements dealing with equal opportunities for men/women, equal pay for men/women and the employment of disabled workers.

The CSR standards put forward by the companies: systematic delivery of good public opinion?

The "CSR" objectives will be strengthened by the adherence to standards such as the GRI (Global Reporting Initiative) but also the (CDP) Carbon Disclosure Project or even the UN Global Compact, or even the U.S. Climate Action Partnership or the OECD Guidelines for Multinational Enterprises (GME), so many standards constituting almost as many labels of "good CSR reputation"⁴⁵. The link between effective and actual adherence to these standards and the resulting good public opinion has been noted in Anglo-Saxon law⁴⁶, and this can be

³⁷ C. Malecki, *The Grenelle II: The Invitation to Rethink Corporate Governance*, Journal of Companies, September 2010, No. 79, Pg. 59 and s. ; G. J. Martin, Transparency and environmental liability of parent companies: the Grenelle II, Rev. Soc., February 2011, No. 2, Pg. 75 and fol.

³⁸ The concept of sustainable development thus makes its entry into corporate law see the Environmental Charter, see Art. 6

³⁹ F.-G. Trébulle, Stakeholder Theory and Corporate Law, Bull. Joly Companies December 2006, § 282, Pg. 1337 Part I, and Bull. Joly Companies 2007, 6 § 1, Pg. 7, part 11, The approach of managers is very interesting on this issue, see J. Igalens, S. Point, *Toward a New Corporate Governance*, Dunod, 2009, sp. Pg. 66 and fol.

⁴⁰ whose terms shall be fixed by decree which is still awaited...

⁴¹ Art. L. 225-102-1 al. 9 C. Com.

⁴² I. Desbarats, CSR and New Organizational Forms of Companies: What Challenges?, Journal of Companies, No. 69, October 2009, Pg. 15 and fol., Sp. Pg. 19. and by the same author, *The Legal Value of a Socially Responsible Commitment*, JCP ed E 2006, I, 1214.

⁴³ AMF 2010 Report on Corporate Governance and Executive Compensation, http://www.amf-france.org/documents/general/9524_1.pdf

⁴⁴ See the website of the Observatory of Reputation, <http://www.obs-reputation.org/>

⁴⁵ Corporate social responsibility

⁴⁶ See *The Harvard Law School Forum on Corporate Governance and Financial Regulation*, Tonello, Matteo, *Sustainability in the Boardroom* (June 16, 2010). The Conference Board Director Notes, No. DN-008, June 2010. Available at SSRN: <http://ssrn.com/abstract=1626050> Kotler, Pg. and Lee, N. (2005). *Corporate Social Responsibility : Doing the Most Good for Your Company and Your Cause*, John Wiley & Sons, Inc.: Hoboken, NJ.; Porter,

very instructive in French law. The manner in which the "board" communicates in the United States is critical, to the point that teacher training for their members in this area⁴⁷ has become essential.

However, stakeholders' expectations are varied since these are themselves so diverse. A necessary hierarchy or stakeholder mapping will assess their potential impact on the development of public opinion, the sum of the various stakeholders' individual opinions. On this point, studies in management sciences offer interesting thinking.⁴⁸ Some authors classify the stakeholders according to their commitments⁴⁹ rather than their by-laws, moreover, in our opinion, the legal approach requires, for greater certainty, a hierarchy of their interests based on a statutory approach, the "mapping" of the stakeholders as proposed in management science according to the level of commitment is too uncertain⁵⁰.

The environmental and social audit and the necessary standardization of information

The tool, now become classic, of good public opinion is the environmental and social audit. An environmental audit⁵¹ is a voluntary or forced procedure for evaluating the management of social and environmental issues within the company. It provides specific guidance on a corporation's behavior. If an accounting audit provides, in principle, a accurate image of accounting law⁵², the social and environmental audit in the dimension defined by the Grenelle II provides an image of the company that is not only accurate but more "virtuous." But what does the environmental audit actually guarantee? In principle, it should, like the accounting audit, ensure the "veracity"⁵³ of the social and environmental health, but it is a "window" for gaining the stakeholders' trust. This "window" can be improved in terms of programs from various backgrounds created from private initiatives. Thus we mention the *Business Social Compliance Initiative* (BSCI), which aims to improve CSR at the European

level in the supply chain. Members are strongly encouraged to obtain the SA 8000 certificate (*Social Accountability Standard*), which subjects them to an external audit to assess compliance with ILO conventions and the universal declarations of rights of man and child and the *Global Social Compliance Program* (GSCP), created in 2006 within the CIES (*The Food Business Forum*) at the initiative of some distributors, in order to meet the requirements in terms of social audits standards. The issues here relate to suppliers but since the latter fall into the very broad category of stakeholders, their commitments and their expectations with regards to corporation cannot be neglected. *We are in the presence of a vast nebula or spider web that is woven in relation the recipients concerned.*

The role of the AMF

The AMF proposes, in its recent report of December 2, 2010⁵⁴, an instructional "guideline" in this regard. The report notes that 50% of companies in the sample use quantified targets: social, environmental, quality⁵⁵, but because the indicators are "rarely the same" because new "quite different" goals have been put in place for fiscal year 2010⁵⁶ or communicate regarding "possible improvements"⁵⁷, the AMF recommends clarity for these objectives and in particular the introduction of these ("clear, precise, reasoned and evaluable") objectives and "monitoring particularly in the reports for the following fiscal years."⁵⁸

Codes of corporate governance, CSR best practices and other labels and certifications

Are these elements potential vectors of good public opinion? - Codes of conduct⁵⁹ and ethical charters⁶⁰,

M.E. & Kramer, M.R. (2011): *Creating Shared Value. Harvard Business Review, January-February*: 62-77.

⁴⁷ The role of the IFA French Institute of Directors is essential in this area, <http://www.ifa-asso.com/>

⁴⁸ J. Igalens, S. Point, *op. cit.*

⁴⁹ A. Sobczak and C. Girard, For a Mapping of Stakeholders based on their Commitment: An Application to Members of a French Mutual Bank. *Management and Future* (33): 151-174.

⁵⁰ A. Berthoin Antal & A. Sobczak, New Perspectives on Stakeholder Commitment: Issues, Actors, Research, Management Review & Outlook, May 2010.

⁵¹ L. Subilia-Rouge, Legal Aspects of the Environmental Audit, Librairie Droz, Geneva, 2000, Pg. 17 and fol.

⁵² F. Pasqualini, The Principle of Accurate Picture in Accounting Law, Pref. E. de Pontavice, Litec, 1992.

⁵³ Veracity or Accuracy of the Accounts with respect to Accounting Standards?, see M.-A. Frison-Roche, The Presuppositions of the Green Paper from the European Commission on the Audit, Bull. Joly Bourse, January 2011, § 31, Pg. 47 and fol.

⁵⁴ AMF Recommendation No. 2010-13 of December 2, 2010 Report on the Information published by Listed Companies in Terms of Social and Environmental Responsibility, http://www.amf-france.org/documents/general/9734_1 online. pdf; C. Malecki, The AMF's Recommendations on Information published by Listed Companies in Terms of Social and Environmental Responsibility, JCP ed. E, 2010, 2140.

⁵⁵ Extension of the ISO 14001 certification for example.

⁵⁶ Such as the carbon footprint of the Group, the integration of the environment in the Group's product design..., Mr. Teller, The Financial Markets, Regulators of Environmental Policy, Bull. Joly Bourse, May 2005, Pg. 211.

⁵⁷ Developing a stakeholder mapping, integration of human rights compliance into the audit programs, global program on diversity...

⁵⁸ Report cited above, Pg. 20.

⁵⁹ I. Desbarat, Codes of Conduct and Ethical Charters under Surveillance, Journal of Labor Law 2008 Pg. 39, obs under TGI Nanterre, October 19, 2007.

⁶⁰ P. Deumier, Charters and Codes of Conduct: The Degrees of Normativity of Ethical Commitments (DGT Circ. 2008/22 of November 19, 2008 on ethical charters, whistleblowing measures and internal regulations), RTD Civ. 2009 Pg. 77, Code of Conduct and Ethical Charters under Surveillance, I. Desbarats, Journal of Labor Law 2008, Pg. 39; R. de Quenaudon and M.-J. Gomez-Mustel, A "Code of Business

by their very nature and by their posted ambitions and objectives, have to build a reputation. Should the legal value of the codes and charters be considered a constraint or leverage for a socially responsible approach? Is a charter only a pipe dream, can it be stricter than a code of corporate governance? We should emphasize the strange silence of the Afep/Medef Code and the Middlednext Code⁶¹ on the very notions of social commitment. The principle of "comply or explain" introduced into our domestic law by the Act of July 3, 2008 raises a central question: Will it be possible for a company to limit or overcome some constraints from the NRE? Can the parent company adopt a corporate governance code that is different from its subsidiaries? The Green Paper "The Framework for Corporate Governance in the EU" released by the European Commission⁶² does not address the issues related to CSR, but the notion of "societal risks." That is in itself progress.

CSR standards and labels abound. Their number is an element of complexity. Let's talk briefly about the CIES union label (Inter-Union Committee on Employee Savings), the "equal opportunity" label, the "diversity" label, the "rating label", Vigéo ranking, the "Fiber citizen" program...

Ethical funds are known to be primarily designed as a "token" of good public CSR opinion⁶³. But more recently, standards of all kinds abound. Thus, within the AFNOR standards agency, a "Sustainable Development Regulatory Commission - Corporate Social Responsibility", (the CNDDRS, dedicated to sustainable development and CSR) produced in 2005 "The Guidelines 21000," a repository for businesses. It assisted in the development of the ISO 26000 Guidelines (promoting "dialogue" in all its forms)⁶⁴ and ISO 14001

Guidelines that improve image among stakeholders, these are potentially so many "tokens" of good public opinion.

As for guides to good practices in governance, they evoke an orientation towards an open capitalism called "stakeholder". It should be emphasized the progress and the mastery of these matters by public accountants and specialists in management science: we could mention the IFAC (*International Federation of Accountants*), the global standardizer of the accounting profession, which published papers in July 2009 intended to guide accounting and finance professionals in their consideration of the company's sustainable development and stakeholders. It seems⁶⁵ that the good practices, strongly encouraged by the European Union, can provide a positive perception of public opinion. In terms of good reputation⁶⁶, it is significant to note that the European Commission and European Parliament regard it as essential in trade agreements. Indeed, the European Parliament Resolution of November 25, 2010 on corporate social responsibility in international trade agreements (2009/2201 (INI)⁶⁷ considers CSR values to be "an effective tool for improving competitiveness, skills and opportunities for training, safety and the work environment, protecting workers' rights and the rights of indigenous and local communities, promoting a sustainable environment policy and encouraging the exchange of good practices at the local, national, European and global level, even though, it cannot, of course, replace either labor regulations or general or sectoral collective bargaining agreements."⁶⁸ CSR values thus seem to be adorned with all the virtues.

Conduct" in search of legal status, Obs. under Versailles of April 17, 2008, No. 07/08624, Dassault Systemes SA, Journal of Labor Law 2009 Pg. 311.

⁶¹ C. Malecki, The First Look by the MFA on the Practice of the MiddleNext Corporate Governance Code, Bull. Joly Bourse, March 2011, § 86, Pg. 197.

⁶² Launched on April 5, 2011, online http://ec.europa.eu/internal_market/company/docs/modern/com2011-164_fr.pdf#page=2

⁶³ I. Riassetto, "Ethical Investment" in *Treatise on French Law of Religions*, F. Messner et al (eds.), Litec, 2003, No. 2130; N. Cuzacq, "Legal Aspects of Responsible Investment," *Mixtures J. Dupichot, Bruylant*, 2005, Pg. 129; C. Malecki, "Socially Responsible Investment: a "must have" of CSR" in *Dossier: Corporate Social Responsibility*, C. Malecki (ed.), Journal of Companies, No. 69, October 2009, Pg. 41; C. Malecki, "Socially Responsible Investment: Some Current Issues," *Lamy Journal of Business Law*, July 2009, Pg. 61; I. Tchotourian Socially Responsible Investment imposed on Portfolio Managers: Real Reform or Pretense of the "Grenelle II Law" in favor of SRI? https://papyrus.bib.umontreal.ca/jspui/bitstream/1866/4162/1/AnalyseArticle82_IT.pdf

⁶⁴ "It can take place through informal or formal meetings, in various forms, such as individual meetings, conferences, workshops, public hearings, roundtables, advisory committees, normal and structured information and consultation proceedings, collective bargaining and interactive forums on the web. The dialogue with

stakeholders should be interactive," Mr. Doucin, The Acclaimed Corporate Social Responsibility (despite its ambiguities), in *Industrial Realities* May 2011, Pg. 24 and fol., Sp. Pg. 29.

⁶⁵ Sen, S. and Bhattacharya, C.B. (2001), *Does Doing Good Always Lead to Doing Better? Consumer Reactions to Corporate Social Responsibility*, *Journal of Marketing Research*, 38 (May), 43-62

⁶⁶ Kotler, P. and Lee, N. (2005), *Corporate Social Responsibility: Doing the Most Good for Your Company and Your Cause*, John Wiley & Sons, Inc., Hoboken, NJ.

⁶⁷ Online: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2010-0446+0+DOC+XML+V0//FR>

⁶⁸ AMF Recommendation No. 2010-13 of December 2, 2010 Report on the information published by listed companies in terms of social and environmental responsibility, http://www.amf-france.org/documents/general/9734_1 online. pdf, cf. excerpts of the report: "12. emphasizes that CSR must be extended to new areas such as work organization, equal opportunities and social inclusion, the fight against discrimination and the development of education and training throughout life stresses that CSR must include, for example, the quality of employment, equal pay and career prospects, and the promotion of innovative projects to contribute to the shift to a sustainable economy; " "13. strongly recommends to Member States and the European Union to promote the implementation of good CSR practices for all businesses, wherever they take their activities, and encourage the dissemination of good practices from CSR initiatives, by including more about their results."

The satisfecits and other rewards: the Nike example

Nike has experienced the horrors of a bad public opinion after a bad image due to a case of unfair competition (Kasky v. Nike case)⁶⁹. However, since this case, Nike has been rewarded for its sustainable development report in May 2011, and indeed a competition organized by the CERES⁷⁰ has for the last ten years allowed major U.S. companies to compare their good practices in reporting. The jury was particularly impressed by the fact that audits of Nike are freely accessible. But the criteria for the competition also includes the complete and comprehensive nature of the report, its credibility and the quality of its presentation. "Nike's sustainability report reveals that the company takes into account the new context that is that of business, namely population growth, declining natural resources and climate change," list the organizers of the CERES⁷¹; "Nike, while seeking a competitive advantage, is moving towards a more sustainable economic model" they add.

The "business and environment" price also plays a role in this "race for the environmental honors"⁷² and other corporate patronage⁷³ in this area but the patronage has always played a positive role in entrepreneurial image.

Public opinion across borders

Public opinion does not recognize borders, so it's logical that the French Ministry of Foreign and European Affairs has appointed an Ambassador in charge of bioethics and corporate social responsibility. The legibility⁷⁴ of the "CSR commitments" of French companies is a communications issue that will also cover foreign companies but on condition that the States are actively involved. For example, the Chinese government encourages Chinese companies to implement eight methodological principles including "improving the ability to achieve sustainable profits by focusing on scientific and democratic decision-making processes, improving product quality and

service in a spirit of protecting the interests of consumers, the only way to build a good image and promote independent innovation and technological progress by increasing investment in research and development."⁷⁵

B. The Influence of Public Opinion on Societal Corporate Governance: The Praise or the Blame

The new vectors of public opinion: the media

The media vectors of public opinion but also "partnership governance mechanisms." Thus, a very instructive study in management science concludes for the constraining role of public opinion coming from the media⁷⁶ on the media thus conceptualizing it as "an mechanism of efficient corporate governance partnership." It states that the media play a vital role in building a reputation, awareness and an image. It is assumed that the press can play a role in disseminating information. In the Sodexho case⁷⁷ (a financial journalist had announced false information on Sodexho's alleged loss of a major contract with the U.S. Army, and despite its being contradicted and corrected, the story was repeated in the meantime by other media causing a 14% drop in Sodexho's share price in one day).

Moreover, the emergence of ethical funds and the active role of institutional investors are intended to help develop a good reputation and *a fortiori* good corporate profits. The press and the internet - whose mainstreaming for listed companies has been enshrined in Article R. 210-20 C. com.⁷⁸ - also contribute to revealing if not amplifying conflicts of interest.⁷⁹

⁶⁹ F.-G. Trébulle, Corporate Social Responsibility and freedom of expression considerations from stopping Nike v / Kasky, Journal of companies 2004 Pg. 261; S. Brunengo-Basso, Corporate Social Responsibility and advertising: what limits the "green washing?", Journal of the Society, May 2011, No. 87, Pg. 35 and fol.

⁷⁰ CERES (Coalition for Responsible Environmentally Economies), group of environmental NGOs which was created after the Exxon Valdez disaster. The CERES thus publishes a code of environmental conduct for companies: the *Valdez Principles*.

⁷¹ <http://www.ceres.org/awards/reporting-awards>

⁷² <http://www.developpement-durable.gouv.fr/Palmares-2010-des-Prix-entreprises.htm>

⁷³ <http://www.developpement-durable.gouv.fr/Mecanat-d-entreprise-pour-le-.html>

⁷⁴ Michel Doucin
http://www.diplomatie.gouv.fr/fr/IMG/pdf/Synthese_RSE_Engagement_France_FR_oct_2010final_2_.pdf

⁷⁵ "Guiding Principles for Public Companies" CSR Research Center, Chinese Academy of Social Sciences, quoted by Mr. Doucin The acclaimed corporate social responsibility (despite its ambiguities), in Industrial Realities May 2011, Pg. 24 and fol., Sp. Pg. 28.

⁷⁶ See Media as a Mechanism for Partnership Governance, Memo from K. Moris and A. Bonachen, online <http://halshs.archives-ouvertes.fr/docs/00/47/69/41/PDF/p16.pdf> and K. Moris, The Media as a Mechanism of Corporate Governance, th. University of Burgundy, supported Nov. 29, 2010, dir. G. Charreaux.

⁷⁷ P. Clermontel, The Right to Financial Disclosure, Pref. N. Molfessis, Business Practice, Joly Editions, 2009, No. 680, Pg. 446.

⁷⁸ Article R. 210-20 D. No. 2010-684 of June 23, 2010 provides "Companies whose shares are traded on a regulated market are required to have a website to meet their obligations to inform their shareholders."

⁷⁹ Walter, I. (2006). *Reputational Risk and Conflicts of Interest in Banking and Finance: The Evidence So Far*. Working Papers, New York University, Leonard N. Stern School of Business, No. 06-27. <http://ssrn.com/abstract=952682>.

Observatories specific to CSR issues: many "cases of resonance in public opinion"

They are all potential critics of good or bad public opinion and all relays for the latter. Their firepower is important because of their diverse backgrounds: public and private: thus, the French "national contact point," established in 2000 to monitor the implementation of the OECD guidelines is effective because it conducts negotiations in response to "specific circumstances" of labor union and NGO origin, filed against companies that failed to comply with the CSR principles. However, communication and publication on the website of the French Ministry of Economy, Labor and Industry plays a corrective role in respect of CSR commitments⁸⁰. The same holds for the HALDE (High Authority against Discrimination and Equality) which is attempting to inject social responsibility into businesses. A directory was even created: the Repository of practices of professional equality between men and women in business entitled "issues of professional equality at SMEs."⁸¹

Electronic public opinion "societal e-reputation"

The internet has become the required medium,⁸² via the repositories sites in particular, to broadcast the reputation at very high speed. The legislature is no stranger to internet use. Already, the implementing decree⁸³ of the TEPA law required that decisions authorizing compensation be published on the website of the company concerned within a maximum of 5 days following the meeting of the board of directors (or supervisory board) during which it was issued. Similarly the Decree of June 23, 2010⁸⁴ establishes, for listed companies, the use of the Internet to disseminate information to the attention of their shareholders.⁸⁵ Among the stakeholders, the employees contribute, through the use of social networks, to spreading messages that can help to change the corporate image.⁸⁶ Moreover, the Grenelle II encourages and supports employees in particular transmit their opinions concerning corporate citizenship commitments.

⁸⁰ This was the case for Metaleurop SA which had to rehabilitate the site following the communication on the NCP website of the follow-up to the order for binding French and European provisions for the rehabilitation of polluted sites.

⁸¹ <http://www.egaliteprofessionnelle.org>

⁸² See Report of December 2, 2010 MFA, supra.

⁸³ Decree No. 2008/448 of May 7, 2008, Official Gazette No. 0110 of May 11, 2008.

⁸⁴ Decree No. 2010-684 of June 23, 2010 on the rights of shareholders of listed companies, OJ June 25, 2010.

⁸⁵ See Article R. 225-73-1 C. Com

⁸⁶ Employees can make virulent statements about the company management, see J.-E. Ray, "Little Brothers are Watching You," Lamy Legal Week December 6, 2010, Pg. 10 and by the same author, "Facebook, the Employee and the Company," Dr. Soc., February 2011

E-reputation or e-public opinion... is developing.⁸⁷ From social networks to shareholder associations sensitized to these issues, from active and responsible shareholder democracy⁸⁸ the threshold will be crossed. The Observatory on Corporate Social Responsibility (ORSE) is an active guardian of companies' compliance with their CSR commitments. The launch of a website "on good CSR reporting practices" intended for major groups and SMEs is expected soon. The Internet has become indispensable, and will be the intractable tool of public opinion for better or worse. Social networks can change the relationship with the company⁸⁹, the Internet has changed the way information on businesses and public social opinion are made and unmade on social networks, the "twittersphere" is the highly reactive sound box for corporate behavior for corporate executives as well as for the CAC 40 companies. These studies are interesting because public opinion's immediacy - which can also relativize the latter - plays a key role and according to TNS Sofres' research the social networks will "either amplify crises that are already publicized, or conversely absorb some questioning from active minorities, or settle over time."

The AMF expressly invites listed companies to use the benchmark websites and reminds them that a proper interpretation of social and environmental information can be made only if the information is legible, formatted and comparable from one fiscal year to the next. In this sense, this reinforces the idea that public opinion in this area should benefit from points of reference recorded over time.⁹⁰ In a report⁹¹ "The AMF recommends that companies that use indicators should carefully define them and use them to the extent that these indicators still meet a need, in a stable way from one year to another. In this regard, companies should be clearer about the definitions and calculation methods used. Moreover, it is important

⁸⁷ See the site of the Observatory's reputation, <http://www.obs-reputation.org/?p=550>

⁸⁸ V. Magnier, New Measures for Shareholder Democracy at Listed Companies, Comment on Decree No. 2010-684 of July 23, 2010, Ordinance No. 2010-1511 of December 9, 2010 and Decree No. 2010-1619 of December 23, 2010 implementing Directive No.2007/36/EC of July 11, 2007 concerning the exercise of certain rights of shareholders of listed companies, Rev. Soc. May 2011, Pg. 267 and fol.; P. Le Cannu, B. Dondero, The Rights of Shareholders of Listed Companies, Rev. trim. dr. com., 2011, No. 1, Pg. 124; Rosenpick Ph., The right to participate in collective decisions reinforced for shareholders of SA and SCA, RLDA, May 2011, No. 60, Pg. 106 and fol.

⁸⁹ 8 CAC 40 companies have attracted more than 350 daily tweets in the last quarter 2010, according to a TNS Sofres - Top Com

⁹⁰ AMF Recommendation No. 2010-13 of December 2, 2010 Report on the Information published by Listed Companies in Terms of Social and Environmental Responsibility, online http://www.amf-france.org/documents/general/9734_1.pdf

⁹¹ C. Malecki, The AMF Recommendations on Information published by Listed Companies in Terms of Social and Environmental Responsibility, JCP ed. E, 2010, 2140.

that companies disclose the most significant indicators concerning their business and do so regardless of their evolution in order to give an accurate image of the company on these issues and enable investors to compare companies with each other."⁹²

2. PUBLIC OPINION: A RISK "INHERENT" IN CSR?

The specificity of non-financial risks

Moreover, the MFA emphasizes the necessary connection between the risks, including those described under "Risk Factors" of the reference document, and the internal control procedures in place, which also includes non-financial risks, that is to say, social and environmental risks in particular."⁹³ This approach advocated by the AMF should provide a better understanding of how the company understands these risks, formalizes them and ultimately attempts to control them. Companies are encouraged in this direction to establish a process for identifying, analyzing and treating risks. It is logical that it also includes non-financial risks.⁹⁴

Therefore, several questions arise: first, how to assess or measure public opinion and, secondly, how to prevent the risk of poor public opinion, or repair a bad public opinion.

A. The Necessary Assessment of Public Opinion

What barometer of public opinion?

Public opinion depends on the report on the implementation, or not, of the societal commitment objectives, two questions arise: firstly, is it possible to assess behaviors related to corporate governance and particularly CSR and, secondly, how to evaluate the effectiveness of the proposed methods. These are key issues. Lines of thought exist. Public opinion can also be analyzed in terms of good business performance because the link between good corporate governance, CSR and performance is established⁹⁵ but the public can also refer to the notion of reputation, which can be a performance vector.

⁹² AMF report cited above, Pg. 23.

⁹³ AMF report cited above, Pg. 30.

⁹⁴ See the symposium organized by DANTE Laboratory, Faculty of Law, University Versailles Saint-Quentin on Friday, June 18, 2010 on "The Apprehension of Financial Risk through Law" http://www.regulatorylawreview.com/IMG/pdf/Programme_colloque_maquette_def_1_.pdf

⁹⁵ Bradley, N. (2004), *Corporate Governance Scoring and the Link Between Corporate Governance and Performance Indicators: in search of the Holy Grail*, *Corporate Governance: An International Review*, Vol. 12, Pgs. 8-10; article in *Corporate Governance: An International Review*, Volume 19, Issue 2, Pg. 136-152, March 2011.

Some mainly managerial studies have thus made the link between CSR and reputation, thus under Dutch law.⁹⁶ Evaluation is essential to measure the impact of public opinion on the company.⁹⁷ But how to estimate it? The non-financial rating agencies such as Vigeo⁹⁸ in France are all "barometers" of ethical values that the ethical funds⁹⁹ are supposed to promote. So the non-financial rating depends strongly on the method used.¹⁰⁰

The indices of financial and non-financial reputation

Public opinion appears and is measured by its own indices, its own rating scale, and its own benchmarks that are derived from corporate governance. In the United States and the United Kingdom, the pragmatic approaches favoring a "best corporate reputation" have developed.¹⁰¹ In France, the Reputation Observatory¹⁰² published in September 1994 the first rating concerning the financial reputation of listed companies and has established a Reputation Values index. The studies and the taking into account of financial reputation thus have a big lead in this area. It allows measuring the quality of the team in place. Women's presence on the board of directors or supervisory board¹⁰³ is already considered an index of openness, efficiency or even "good public opinion."¹⁰⁴

⁹⁶ Aloy Soppe, Marc Schauten, Jurjen Soppe, Uzay Kaymak, *Corporate Social Responsibility Reputation (SRRC) Do Companies comply with their Raised CSR Expectations?* SSRN: <http://ssrn.com/abstract=1417995>

⁹⁷ J. Igalens, How to assess sustainability reports?, *French Review of Management*, Vol. 30, No. 152, Pg. 151-158.

⁹⁸ <http://www.vigeo.com/csr-rating-agency/>

⁹⁹ C. Malecki, Socially responsible investment: some remarks on the rising value of "green" corporate governance in The "Green" Governance of Listed Companies facing the Crisis, to better protect the interests of society, under the direction of V. Magnier, Prof. Dr. Marini, LGDJ, al. *Business Law*, 2010, Pg. 263 and fol. and by the same author, *Socially Responsible Investing: a "must have" of CSR: Corporate Journal*, No. 69, October 2009, Pg. 41 et seq.

¹⁰⁰ H. Sherman, *Corporate Governance Ratings, Corporate Governance: An International Review*, 2004, Vol. 12, Pgs. 5-7.

¹⁰¹ Strahilevitz, M. (2003). *The Effects of Prior Impressions of a Firm's Ethics on the Success of a Cause-Related Marketing Campaign: Do the Good Look Better While the Bad Look Worse?*, *Journal of Nonprofit & Public Sector Marketing*, 11 (1), 77-92.

¹⁰² <http://www.obs-reputation.org/>

¹⁰³ See Law No. 2001-103 of January 27, 2011 on the balanced representation of men and women on boards of directors and supervisory boards and professional equality, OJ January 28, 2011.

¹⁰⁴ The Anglo-Saxon studies and the research centers devoted to such questions abound, including for example, *Women Matter*, McKinsey & Company, 2007; *Female Leadership and Firm Profitability*, Finnish Business and Policy Forum - EVA 2007, *The Bottom Line: Connecting Corporate Performance and Gender Diversity*, Catalyst 2004

The era of assessment and self-assessment

This is the era of assessment and perhaps the "dictatorship" of assessment. This assessment takes place upstream of the dissemination of CSR information: indeed, the statutory auditors' role is critical. They must assess whether the social or environmental policy is having an impact on the company's financial position. Does corporate governance thus make evaluating the board of directors an essential element¹⁰⁵: according to the Recommendation published by the European Commission in 2005 concerning the role of non-executive directors and members of the supervisory board of listed companies, the board of directors or supervisory board should review its performance annually. As such, it should in particular review its membership, its organization and its functioning as a body, and evaluate the competence and effectiveness of each of its members and of its committees and measure its results against the objectives it set for itself. The Green Paper from the European Commission¹⁰⁶ even provides that "The routine use, every three years for example, of an external facilitator can improve this evaluation by giving it an objective dimension and by shedding on it the light of good practices at other companies."

In France, this assessment is also recommended particularly by the Middlednext Code¹⁰⁷: does the AMF in its first report on corporate governance, executive compensation and the internal control of VaMPs insist on "evaluating the work of the board and its committees?" The Middlednext Code recommends an "annual self-evaluation"¹⁰⁸ of the board. The AMF, in its report of December 2, 2010, even recommends "explaining in detail" the reasons why companies do not implement such a

recommendation.¹⁰⁹ This is particularly important since the MiddleNext Code emphasizes the "sovereign power of shareholders,"¹¹⁰ the findings from the board's self-assessment of its work will therefore be instructive. We might predict that the number of group actions brought against a company could also provide an "index" of trust or distrust. These group actions could¹¹¹ play a role in the company's image. The criteria for evaluating good corporate governance practice are known and practiced¹¹² and can be enriched by criteria specific to CSR.

B. What Prevention, Which Repair?

Damage to the company's societal image: the "name and shame"

This manifests itself by a distrust of the company, which immediately shows up in the financial markets by lower prices or a drop in product orders. Repairing that damage poses difficulties even if it should be emphasized that repairing the damages to image seems easier for public law corporations¹¹³. The doctrine is divided on such repairing of mistrust. A bad reputation, bad *fama*, can indeed cause harm to officers, to shareholders, and to the company. The company, through mismanagement of its image, can also be the author of its own bad reputation.¹¹⁴

The usefulness of the concept of collective image

This concept was enshrined in "Lamour" law on the organization and promotion of sports and physical activity, and it is thus a tool for reflection as its goal is to involve each player individually in the collective exploitation, by his club, of the team's image. This is a "right to" the collective image based on the idea that a team that is composed of several athletes would give an "image" that is separate from that of each

¹⁰⁵ Recommendation 2005/162/EC of the Commission of February 15, 2005 concerning the role of non-executive directors and members of the supervisory board of listed companies and the committees of the board of directors or supervisory board.

¹⁰⁶ http://ec.europa.eu/internal_market/company/docs/modern/com2011-164_fr.pdf # page = 2, Pg. 9, § 1.3; referring to OECD, *Corporate Governance and the Financial Crisis: Conclusions and Emerging Good Practices to Enhance Implementation of the Principles*, February 24, 2010, Pg. 20

¹⁰⁷ VaMPs; AMF Recommendation No. 2010-15 of December 7, 2010 Supplementary Report of the AMF on Corporate Governance, Executive Compensation and Internal Control - Mean and Small Values referring to the MiddleNext Code of Corporate Governance of December 2009, online, http://www.amf-france.org/documents/general/9749_1.pdf; http://www.middlednext.com/IMG/pdf/Code_de_gouvernance_site.pdf

¹⁰⁸ However, to the extent that the MiddleNext Code emphasizes the "sovereign power of shareholders," noting in particular that "the point of vigilance thus consists of evaluating whether "the shareholder" has clear information on major and predictable risks that could threaten the sustainability of profits," the findings of the board's self-assessment of its own work will be instructive.

¹⁰⁹ Report cited above, Pg. 32.

¹¹⁰ http://www.middlednext.com/IMG/pdf/Code_de_gouvernance_site.pdf, Pg. 27.

¹¹¹ The conditional delay in giving reasons for the reluctance against group actions in the financial sector, see the Summary of the consultation on the report of the working group on compensation for damages suffered by savers and investors, online http://www.amf-france.org/documents/general/9967_1.pdf

¹¹² Such as Governance Metrics International (GMI) and Institutional Shareholder Services (ISS)

¹¹³ See J. Girard, *The Stuck Image of Local Government*, Env. Law, No. 156, 2008; J.-S. Borghetti, *Repairing the Damage to the Brand Image and Reputation of Local Government*, Reflections from the Erika Case, RDA, No. 1, Jan 2010, Pg. 53.

¹¹⁴ In the Regina Rubens case, the Paris Criminal Court on January 22, 2007 refused the allocation of damages to a company because of the moral damage suffered by it because of the harm caused to its image and its brand by the disseminating of inaccurate information, see P. Clermontel, supra, Pg. 446.

individual athlete.¹¹⁵ The parallel with this concept of collective image in sports law could be made for a collective CSR image, insofar as we could compare the "leadership team" to a sports team. The collective body of the board of directors, which "collectively" represents all the shareholders, could benefit from this concept, even though the directors' individual responsibility is gradually being recognized by the jurisprudence.¹¹⁶ However, without yielding to a "harmful" anthropomorphism¹¹⁷, and necessarily passing through the "fiction of humanity,"¹¹⁸ the face of the moral personality can benefit from protecting its societal image but it may still be necessary to define it, which is a daunting task. The movement towards recognizing the personal rights of corporations, initiated by the jurisprudence of the ECHR¹¹⁹ is an encouraging sign in this direction. The difficulty lies rather in the *conceptualization* of a right to an image because the *protection* of the right to an image is enshrined in Article 9 of the Civil Code and it is a given that it may concern a corporation.¹²⁰

What are the correctors of poor public opinion? Or how to limit distrust?

Several tracks can be followed. Good communication regarding corporate governance and the necessary training of board members in this area are needed: what to communicate and where to communicate it - management report and website dedicated to these CSR questions, media - how to communicate.

What repair?

Damage to a company's societal image appears to be almost irreparable as the effects of public opinion's immediacy and responsiveness are devastating. Certainly, compensation through liquidated damages

based on Article 1382 of the Civil Code or redress resulting from an action for interim measures are conceivable but the repair or correction or even the rehabilitation of good societal reputation takes time. However an immediate response and taking action on the Internet in response to unfounded attacks on a societal reputation¹²¹ might have to be considered.

Towards a risk to reputation and the role of insurance

Is it possible to make the connection between an inventory of social and environmental information and the associated risk to the societal perception? Insurance is playing an ever-growing role in environmental matters¹²² and it is conceivable to consider that the risk to reputation inherent in CSR can be understood. The "societal risks" are expressly mentioned in the Green Paper from the European Commission.¹²³ Mismanagement of these risks can lead to bad public opinion. Shouldn't these disclosure obligations also cover the main risks that the company can impose on society as a whole ("societal risks")?

A right to oblivion?: The delicate question of the time criterion

Cases such as The Exxon Valdez, Enron¹²⁴ and Erika¹²⁵ are etched in our memory. This then raises the question of possible lapse of memory as a corrector of any bad public opinion. The AMF also plays a role in such corporate reputation, especially since Act No. 2010-1249 of October 22, 2010 on Banking and Financial Regulation,¹²⁶ has gone into effect, which provides that the meetings of the Sanctions Commission are public. Anyone can come and attend "However, ex officio or at the request of a defendant, the chairman of the panel hearing the case may prohibit public access to the room during all or

¹¹⁵ P. Moyersoen, The Concept of Collective Image, Heritage & Law Review, July-August 2005, No. 139, Pg. 82 and fol.

¹¹⁶ Cass. Com., March 9, 2010, No. 08-21793, P+B, EPF Partners SA c/A.: JurisData No. 2010-001500 (Gaudriot Case); Cass. Com., March 30, 2010, No. 08-17841, No. 2010-002958 Jurisdata (Credit Martinique Case).

¹¹⁷ J.-F. Quiévy, Legal Anthropology of the Corporation, Th. Paris XI, May 2008, Dir. D.R. Martin, Pg. 279 and Pg. 339 and fol.; J.-P. Gastaud, Corporate Status and Subjective Law, LGDJ thesis, 1978.

¹¹⁸ J.-F. Quiévy, th. supra, Pg. 339: "Sacrificing a Harmful Anthropomorphism, Part of the Doctrine and Jurisprudence have forgotten that the Corporation is an Abstraction, certainly beneficial but indisputable, and cannot therefore, by a fiction of humanity, be introduced into the human race."

¹¹⁹ L. Dumoulin, The Personality Rights of Corporations, Rev. Soc. 2006, Pg. 1; N. Mathey, The Fundamental Rights and Freedoms of Private Law Corporations, Rev. trim. Civ. Law 2008, Pg. 205 and fol. L. Marino, A Plea for Freedom of Expression, Fundamental Right of the Company, Rev. trim. Com. Law, 2011, No. 1, Pg. 1 and fol.

¹²⁰ See for an association, which can be considered a victim within the meaning of Article 34 Conv. EDH and even seek the protection of Article 8 to protect the secrecy of its correspondence.

¹²¹ M.-P. Blin-Franchomme, I. Desbarats, G. Jazottes, V. Vidalens, Business and Sustainable Development, Legal Approaches for the Economic Agent of the XXI Century, Lamy Axe Law Collection, 2011, cites the "reputation risk", No. 12, Pg. 27

¹²² B. Rajot, Insurance for Environmental Risks, Journal of Companies, No. 84, February 2011, Pg. 21 and fol. and the many references.

¹²³ Green Paper cited above, one interesting question is posed: "These disclosure requirements should they also cover the main risks that the company can impose on society as a whole ("societal risk")?" P 12, § 1.5

¹²⁴ Heal Paul M., Krishna G. Palepu, (2003), The Fall of Enron, Journal of Economics Perspective, 17 (2). pp. 3-26, Spring; Enron that led to such alerts or professional ethics, whistleblowing, cf. on this point, F. Barière, About the judgment of 8 December 2009 of the Commercial Chamber of the Court of Cassation, Rev. soc. 2010, Pg. 483 and s., Sp. No. 9, Pg. 485. These alerts could in future prevent such cases very disadvantageous for the company image.

¹²⁵ L. Neyret, Erika The case: evolution of motor civil and criminal liabilities, D. 2010, Chron. Pg. 2238 et seq.

¹²⁶ Law published in the Official Gazette No. 247 of October 23, 2010.

part of the hearing in the interest of public order, national security or when the protection of business secrets or other secrets protected by law so requires.¹²⁷ The Sanctions Commission provides that its decisions are published on the AMF website and the Collection of the Decisions of the Sanctions Commission and the Appeals Courts.¹²⁸ The punitive aspect of the publication of the sanction decision cannot be negligible.¹²⁹ The duration of the publication is an essential element.

Speaking in another area, a recent priority question as to constitutionality¹³⁰ concluded in a defamation suit that Article 35, paragraph 5, of the Law on Freedom of the Press is unconstitutional. While this decision certainly needs to be analyzed in its context. The time test is discussed therein: considering that "freedom of expression and communication is all the more valuable because its exercise is a prerequisite for democracy and one of the guarantees of respect for other rights and freedoms", the Commission emphasizes that "violations in the exercise of this freedom must be necessary, appropriate and proportionate to the objective pursued." The Constitutional Council emphasizes that this "prohibition applies without distinction, as long they refer to events that occurred more than ten years ago, all oral or written remarks resulting from historical or scientific works and the allocations in reference to events whose recalling or commenting on are part of a general interest public debate." By "its general and absolute nature, this ban impairs freedom of speech in a way that is disproportionate to the goal pursued, and it thus violates Article 11 of the Declaration of 1789." Nevertheless, to the extent that freedom of the press plays a role in societal reputation, the Constitutional Council's decision, which can be understood in regards to such freedom of expression, can be a hindrance to any possible right to oblivion which certainly, with the new technologies, poses difficulties. These rights are contradictory, yet there are grounds for both. One of the corporate governance issues will in particular, because of problems specific to CSR, be to try to restore or correct a bad CSR image. Information can then chase away other information. The immediacy of online communication will have effects that are often contradictory but can correct themselves. Stakeholders' expectations and the "relaying" of the latter, particularly through dissemination of public information on Internet sites, may be limited by the necessary trade secrets or "the company's legitimate interests," concepts that could reasonably be invoked

to "correct" bad public opinion¹³¹ since the Internet often has a long memory...

In conclusion

Boileau, in his wonderful writings described the vulnerability of a reputation "*Remains of these spirits once so renowned, Which by a stroke of his art Molière had defamed*". CSR brings out the concept of "reputational" corporate governance, which is an element of fragility as the observatories, media and demonstrations of public opinion are so different and worrisome. However, such corporate governance should only be vulnerable on the surface as it involves the establishment of *sustainable* practices and goals, this would avoid good public opinion turning into bad public opinion by one "click" on a computer keyboard.

¹²⁷ Article L. 621-15 of the Monetary and Financial Code

¹²⁸ http://www.amf-france.org/documents/general/9751_1.pdf

¹²⁹ Publication of decisions on sanctions in the financial sector, L. Schwebel, JPC Ed. E 2009, 1861)

¹³⁰ Cons. Const., December No. 2011-131 QPC, May 20, 2011

¹³¹ D. Rousseau, Freedom of Communication, RLDA, December 2010, Supplement to No. 55, Pg. 64.