Gide & Gray's Inn Essay Prize 2024

Winning essay

Topic: A comparison of law affecting commercial transactions in the French and English legal systems.

Question: To what extent do the duties and responsibilities of a company director, and the consequences of their breach, differ in the laws of France and England? *What do these differences reveal with respect to the legal and business cultures of the two countries, and how, if at all, has history played a part?*

September 8, 2024

Steven Banks
Chief Executive Officer
Summit Solutions
17 Fleetwood Boulevard
London, England

Dear Mr. Banks,

I am writing to discuss how your duties and liabilities as a company director in England differ from those in France, and what these differences reveal about the distinct approaches businesses in each country take towards corporate social responsibility. I hope that this letter will enhance your knowledge of French law and help you to determine the best approach to promote the company's success.

Executive Summary

Companies in England prioritise shareholder value and a market-oriented approach, whilst those in France apply a stakeholder-orientated approach.[1] It is important to consider how each approach can have a significant impact on the long-term success of a company, and this will be explored later in this letter. To aid this discussion, I will use the Companies Act[2] and the Code de Commerce (the French Commercial Code)[3] to explore the duties and liabilities of a company director in England and France and how they differ. These differences exist due to the distinct legal frameworks of each country, which have arisen due to their unique historical developments; French law

[1] Mathew Laurence and Khem Rogaly, 'Stagnant and Unequal: How the UK Is an Outlier in Corporate Governance and Why That Matters | Briefing | Common Wealth' (*Common-wealth.org*24 March 2023) <https://www.common-wealth.org/publications/stagnant-and-unequal-how-the-uk-is-an-outlier-in-corporate-governance-and-why-that-matters> accessed 5 September 2024.
[2] Companies Act 2006.
[3] Code de Commerce 1807 (the French Commercial Code).

has been moulded by civil law tradition, whereas English law is rooted in common law tradition.[4] The purpose of this letter is to inform you about these differences and provide you with a broader insight into strategically managing cross-border transactions if you choose to expand your market. This will ensure that you are made aware of the regulatory requirements found within a different business culture to mitigate any legal risks that can stem from potential non-compliance.

Duties of a Company Director: English Common Law vs. French Civil Law

As a company director based in England, you have several duties assigned to you, which I am sure you will already be familiar with. You must only use the company's powers for the purpose for which they are intended,[5][6] promote the company's success (with a focus on shareholder value),[7] exercise independent judgement,[8] exercise reasonable skill,[9][10] avoid potential conflicts of interest,[11] reject benefits from third parties,[12] and declare any personal interests in proposed commercial transactions.[13] Adherence to these duties is of the utmost importance, not only because they are legally binding, but also because it reflects the company's efficiency and ethical values. A strong reputation leads to investor confidence, boosting the company's growth and success.[14]

However, the statutory duties outlined in the Code de Commerce are much more general. The key responsibilities of a company director in France include acting in the company's best interests and, notably, taking employees and customers into consideration rather than focusing solely on shareholder value.[15] It is vital that they

---

[4] Lori Corso, 'LibGuides: French Legal Resources: French Legal System' (*libguides.law.villanova.edu*16 May 2023) <https://libguides.law.villanova.edu/FrenchLegalResources> accessed 4 September 2024.
[5] Companies Act 2006, (n 2) c. 46, s. 171.
[6] *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821
[7] Companies Act 2006, (n 2) c. 46, s. 172(1).
[8] Companies Act 2006, (n 2) c. 46, s. 173.
[9] Companies Act 2006, (n 2) c. 46, s. 174.
[10] *Re D'Jan of London Ltd* [1994] 1 BCLC 561
[11] Companies Act 2006, (n 2) c. 46, s. 175.
[12] Companies Act 2006, (n 2) c. 46, s. 176.
[13] Companies Act 2006, (n 2) c. 46, s. 177.
[14] Annabel Reed, 'The Importance of Corporate Reputation in Supporting Company Valuations and Accessing Capital - APCO Worldwide' (*apcoworldwide.com*12 July 2023) <https://apcoworldwide.com/blog/the-importance-of-corporate-reputation-in-supporting-company-valuations-and-accessing-capital/> accessed 5 September 2024.
[15] Code de Commerce 1807, (n 3) Article L225-251.

also avoid any conflicts of interest.[16] The duties of a company director are codified in both countries. However, France's civil law system leaves little room for statutory interpretation compared to England's common law system.[17] Although the provisions in the Code de Commerce are more explicitly stated, which means that there is a higher level of predictability and therefore less of a requirement for judicial interpretation, it also means there is less flexibility. This can be linked to historical factors, more specifically the French Revolution, and the creation of the Napoleonic Code (Code Civil)[18] where all of France's laws were written to guarantee certainty and clarity.[19] However, because judicial precedent is not used, there is a lack of guidance available in complex cases.

In a dynamic and ever-evolving marketplace, there must be room for adaptability. England's common law system relies on judicial precedent in the interpretation and application of statutes, which is what makes it so adaptable; it evolves in response to societal shifts, which improves corporate behaviour.[20] However, adaptability also leaves room for ambiguity, which can lead to legal problems.

Consequences of Breach

Both countries impose strict duties to ensure that company directors act in the company's best interests; a cardinal rule in corporate governance. Failure to do so means that company directors can be held personally liable. They must also disclose their wrongdoing.[21]

For example, in England, the Insolvency Act states that company directors can be found personally liable, and consequently disqualified from their role[22] if there have

[16] Code de Commerce 1807, (n 3) Article L225-243.
[17] Thomson Reuters, 'What Is the Definition of Common Law?' (*legal. thomsonreuters.com*15 November 2022) <https://legal.thomsonreuters.com/en/insights/articles/what-is-common-law> accessed 5 September 2024.
[18] Code Civil 1804 (the French Civil Code)
[19] History com Editors, 'Napoleonic Code Approved in France' (*History*15 March 2024) <https://www.history.com/this-day-in-history/napoleonic-code-approved-in-france> accessed 5 September 2024.
[20] Paul Redmond, 'Directors' Duties and Corporate Social Responsiveness,' Vol 35(1), (2012): 332 <https://classic.austlii.edu.au/au/journals/UNSWLawJl/2012/13.pdf> accessed 5 September 2024.
[21] Item Software (UK) Ltd v Fassihi [2004] EWCA Civ 1244
[22] Company Directors Disqualification Act 1986 s. 4(1)(a)

been instances of fraudulent trading with "the intent to defraud creditors",[23] or "wrongful trading", where the company director "knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation".[24] There is some level of protection due to England's common law system and its use of judicial interpretation, which means that there is more leniency in the law since "wrongful trading" can be interpreted in many ways. However, although flexibility in the law can be used as an advantage in complex situations, this can also result in unpredictability in the law, leading to confusion around personal liability.

In France, the Loi Sapin II was introduced in 2016 to hold company directors accountable for any non-compliance or misconduct within their company.[25] This law requires company directors to put preventative measures in place to guarantee zero corruption. This is a much more proactive approach to tackling non-compliance, but it is also mandatory. If company directors do not put preventative measures in place, they risk being personally liable. Similarly, the UK Bribery Act was implemented in 2010 with the same anti-misconduct objective and consequences for company directors.[26] Both statutes also tackle non-compliance domestically and internationally: "Any omissions done or made outside the United Kingdom would form part of such an offence if done or made in the United Kingdom."[27] Non-compliance can result in fines and monetary penalties.[28]

The statutory provisions in the Code de Commerce are more strictly enforced in France due to the rigidity of their civil law system. They are clearly outlined to prevent ambiguity in the law, which makes it more difficult for company directors to defend themselves in complex situations - but it does mean that there is certainty in the law.

---

[23] Insolvency Act 1986, c. 45, s. 213(1).
[24] Insolvency Act 1986, c.45, s. 214(2)(b).
[25] *Loi 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* (Sapin II) Article 17. Translation: *Law No. 2016-1691 of December 9, 2016, on transparency, the fight against corruption, and the modernization of economic life* (Sapin II) Article 17.
[26] Bribery Act 2010, c. 23, s. 7(2)
[27] Bribery Act 2010, c. 23, s. 12(2)(b)
[28] Kevin Chinniah, 'Understanding the Penalties Associated with Non-Compliance in the Context of the CSRD: Current Status across European Countries – SustainZone Insights' (*Sustainzone.co.uk*2 September 2024) <https://sustainzone.co.uk/blog/understanding-the-penalties-associated-with-non-compliance-in-the-context-of-the-csrd-current-status-across-european-countries/> accessed 6 September 2024.

Company directors in England are ultimately legally covered in their decision-making, whereas company directors in France are discouraged from taking risks due to the strictly enforced statutory provisions. A dynamic marketplace requires adaptability. This is because it is constantly improving, and too much rigidity in the law can make it difficult for companies to respond to new business-related challenges.

Evolution of the Market-Orientated Approach in England

Another important distinction is the approaches carried out by company directors in both countries, which we can examine in the Companies Act and Code de Commerce. Companies in England prioritise their shareholders' interests and a business culture that focuses on profitability,[29] which stems from England's common law system and its long-standing history of protecting individual property rights.[30] Therefore, the duties of a company director are owed not only to the company itself but also to its shareholders (i.e. the company has a primary, fiduciary duty to act in the best interests of its shareholders).[31] Business culture in England relies on a market-orientated approach to drive success.

Various historical factors, such as the emergence of capitalism during the Industrial Revolution, entrenched England's preference for a market-orientated strategy in business culture, focusing on productivity to maximise economic growth.[32] Additionally, the rise of the British Empire played a key role in opening up international trade, leading to key financial organisations being established, such as the London Stock Exchange.[33]

---

[29] Companies Act 2006 (n 5).
[30] Gregory Alexander and Charles Donahue, 'Property Law - Property Law and the Western Concept of Private Property' (*Encyclopaedia Britannica*11 May 2024) <https://www.britannica.com/topic/property-law/Property-law-and-the-Western-concept-of-private-property> accessed 5 September 2024.
[31] *Percival v Wright* [1902] 2 Ch 421.
[32] Joel Mokyr, 'Regions and Industries: A Perspective on the Industrial Revolution in Britain' (2006) 22 Journal of Interdisciplinary History 1 <https://faculty.wcas.northwestern.edu/jmokyr/Baumol-volume.PDF> accessed 5 September 2024.
[33] Deborah D'souza, 'How London Became the World's Financial Hub' (*Investopedia*29 July 2023) <https://www.investopedia.com/how-london-became-the-world-s-financial-hub-4589324> accessed 5 September 2024.

There are also legal factors that have shaped England's market-orientated strategy in corporate governance. For instance, the Joint-Stock Companies Act[34] introduced a public registry to simplify the formation of companies,[35] defined companies as separate legal entities,[36] and enforced the requirement of regularly reporting the company's finances to boost investor confidence.[37] Limited liability was not guaranteed until the first Companies Act was introduced in 1862, which resulted in the protection of shareholders' interests – a primary duty of a company director.[38]

That is not to say that companies in England do not also acknowledge the interests of stakeholders, such as their employees. The flexibility of England's common law system means that the duties of a company director can be interpreted so that stakeholders' requirements are also met. However, this is less of a priority and rather a secondary duty. Nevertheless, a stakeholder-orientated approach is praised as being socially responsible and sustainable, as it considers the company's impact on society.[39] Companies in France that use this approach value the long-term consequences of their decisions over short-term profits. Shareholder value is still acknowledged, but stakeholders are a priority to ensure long-term success.[40]

Role of EU Directives in France's Business Culture: A Stakeholder-Orientated Approach

Company directors in France are praised for their policies dedicated to transparency, sustainability and accountability. However, much of this is due to the influence of EU directives on corporate governance. For instance, the transparency and accountability[41] entrenched in France's business culture stems from the directives for Financial and Non-Financial Reporting, i.e. transparency about finances as well as social and environmental impact.[42][43] The latter was reviewed and replaced in 2022

[34] Joint-Stock Companies Act 1844.
[35] ibid, s. 1.
[36] ibid, s. 7.
[37] ibid s. 25.
[38] Companies Act 1862, 25 & 26 Vict., c. 89, s. 6 and s. 8.
[39] Hart O Awa, Willie Etim and Enyinda Ogbonda, 'Stakeholders, Stakeholder Theory and Corporate Social Responsibility (CSR)' (2024) 9 International journal of corporate social responsibility <https://jcsr.springeropen.com/articles/10.1186/s40991-024-00094-y> accessed 6 September 2024.
[40] European Union's Directive on Shareholders' Rights II (2017/828/EU) (14)
[41] Ibid.
[42] European Union's Directive on Financial Reporting (2013/34/EU)
[43] European Union's Directive on Non-Financial Reporting (2014/95/EU)

with the Corporate Sustainability Reporting Directive, which introduced the legal requirement for sustainability reports. The purpose of this directive is to boost investor confidence and gain stakeholders' trust, whilst encouraging companies to consider their long-term sustainability goals.[44] However, this can be burdensome for smaller businesses where the process of complying with the law and reporting sustainability can be difficult due to financial challenges.[45] The EU also encourages a stakeholder-orientated approach with its directives, by promoting the fair treatment of employees[46] and protecting their rights during company transfers.[47] The Services Directive has also encouraged cross-border operations, allowing French companies to expand their market and become more adaptable to coincide with changing societal expectations.[48]

Post-Brexit Corporate Governance in England

Brexit has had a considerable impact on the duties and liabilities of company directors in England. Before Brexit, England's principles of corporate governance were influenced by the same EU directives that currently govern France's business culture, which meant that company directors had a lot more responsibilities. In addition to these, there was also the Shareholders' Rights Directive[49] and Market Abuse Regulation[50], which ensured the accountability and compliance of company directors, the Transparency Directive, which ensured financial reporting, and the Non-Financial Reporting Directive, which ensured sustainability reporting.[51] Since Brexit, there has been less consistency across borders, which can lead to legal risks if there is not enough awareness of different regulatory requirements. Transparency and accountability remain a fundamental part of the UK's business culture due to the UK Corporate Governance Code,[52] but corporate social responsibility and long-term sustainability are loosely encouraged rather than legally enforced. The Afep-Medef

[44] European Union's Directive on Corporate Sustainability Reporting (2022/2464/EU)
[45] Paulina Permatasari and Juniati Gunawan, 'Sustainability Policies for Small Medium Enterprises: WHO Are the Actors?' (2023) 9 Cleaner and Responsible Consumption 100122 <https://www.sciencedirect.com/science/article/pii/S2666784323000232> accessed 6 September 2024.
[46] European Union's Directive on Transparent and Predictable Working Conditions (2019/1152/EU)
[47] European Union's Directive on Transfer of Undertakings (2001/23/EC)
[48] European Union's Directive on Services (2006/123/EC)
[49] Shareholders' Rights Directive (n 40)
[50] Market Abuse Regulation (2014/596/EU)
[51] Non-Financial Reporting Directive (n 43)
[52] FRC, 'UK Corporate Governance Code' (*FRC (Financial Reporting Council)*2024) <https://www.frc.org.uk/library/standards-codes-policy/corporate-governance/uk-corporate-governance-code/> accessed 5 September 2024.

Code, which is referred to in French corporate law, is also not legally enforced. However, if a company does not comply with the regulations, it can damage its reputation.[53]

Corporate Social Responsibility and Total Responsibility Management

Companies have a "corporate social responsibility" (CSR) to consider their societal impact.[54] Many multinational corporations are starting to use a "total responsibility management" (TRM) approach to improve their CSR.[55] This is due to pressures from primary stakeholders (e.g. employees), secondary stakeholders (e.g. non-governmental organisations) and public expectations for companies to manage their impact on the environment and society.[56] Inspiration (vision), integration and improvement are the three key components that address these pressures.[57] TRM would be an effective and strategic way of shifting a company's focus towards stakeholders' interests, long-term sustainability, and transparency to guarantee long-term success, as opposed to shareholder value and short-term profits.

France's Progressive Implementation of TRM

France has incorporated all three elements of TRM into its legal and business frameworks:

1. The 'improvement' component was addressed with the Grenelle II law in 2010, which demands sustainability reports and financial transparency to observe company progress.[58]
2. The 'integration' element of TRM was also implemented by France in 2017 with the Duty of Vigilance law, which embeds accountability into companies and

[53] AFEP-MEDEF Code of Corporate Governance (Revised 2020)
[54] European Commission, 'A Renewed EU Strategy 2011–14 for Corporate Social Responsibility' (Communication No 681, European Commission, 25 October 2011) 6.
[55] Sandra A Waddock, Charles Bodwell and Samuel B Graves, 'Responsibility: The New Business Imperative' (2002) 16 Academy of Management Perspectives 132 <https://journals.aom.org/doi/abs/10.5465/AME.2002.7173581> accessed 5 September 2024.
[56] ibid.
[57] ibid.
[58] Loi n° 2010-788 du 12 juillet 2010 portant engagement national pour l'environnement (Grenelle II). Translation: French Law No. 2010-788 of July 12, 2010, on the National Commitment for the Environment (Grenelle II)

ensures that measures are taken to alleviate the risk of environmental damage and human rights abuse.[59]

3. The 2019 PACTE law affirmed that companies have social and environmental responsibilities to ensure long-term sustainability, which coincides with the 'vision' element of TRM.[60]

Notably, the Loi NRE also made CSR reporting mandatory in 2001, demonstrating France's commitment to transparency within its business culture from an early stage.[61]

Next Steps: The Potential Role of TRM

England has already implemented measures to improve CSR within its business culture with the Companies Act[62] and the UK Corporate Governance Code, which lays out the importance of accountability and transparency.[63] However, it is at the companies' discretion whether to implement their own policies to improve CSR. This is a criticism of the Companies Act; it does not provide clear guidance on CSR.[64] Moreover, the motivation behind companies implementing policies is usually to boost their reputation and investor confidence rather than to address the company's social and environmental impact. In other words, "projecting a socially responsible image whilst retaining destructive practices" means that companies can claim that they are socially and environmentally responsible without committing to any policies.[65]

It is crucial that as a company director, you consider the company's reputation as well as its social and environmental impact to guarantee long-term success over short-term

---

[59] Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre. Translation: French Law No. 2017-399 of March 27, 2017, on the Duty of Vigilance of Parent Companies and Ordering Companies.
[60] Loi n° 2019-486 du 22 mai 2019 relative à la Croissance et la Transformation des Entreprises (PACTE). Translation: French Law No. 2019-486 of May 22, 2019, on the Action Plan for the Growth and Transformation of Enterprises (PACTE).
[61] *Loi n° 2001-420 du 15 mai 2001 relative aux nouvelles régulations économiques* (Loi NRE). Translation: *Law No. 2001-420 of May 15, 2001, on new economic regulations*.
[62] Companies Act 2006 (n 2)
[63] UK Corporate Governance Code (n 52)
[64] Ruba Subhi Hamed, Basiem Khalil Al-Shattarat and Wasim Khalil Al-Shattarat, 'The Impact of Introducing New Regulations on the Quality of CSR Reporting: Evidence from the UK' (2021) 46 Journal of International Accounting, Auditing and Taxation 100444 <https://pure.port.ac.uk/ws/portalfiles/portal/50274317/The_impact_of_introducing_new_regulations_on_the_quality_of_CSR_reporting.pdf> accessed 6 September 2024.
[65] Claire Fauset, 'What's Wrong with Corporate Social Responsibility?' (2006) <https://corporatewatch.org/wp-content/uploads/2017/09/CSRreport.pdf> accessed 6 September 2024. p.11.

profits. Therefore, I propose that you embed a TRM approach into the company's practices, which would allow you to address societal pressures more effectively. Introducing stricter guidelines for reporting social and environmental impact, prioritising the role of stakeholders, and creating long-term sustainability goals would result in a more responsible, ethical, sustainable, transparent and financially successful company.[66]

Furthermore, if you choose to expand your market, you can adapt the company's policies to comply with France's civil law system and regulatory requirements. Combining the predictability of France's civil law system with the flexibility of the English common law system would allow you to develop a robust corporate governance framework. This would improve the company's CSR, mitigate any legal risks, and benefit both shareholders and stakeholders.

As mentioned earlier, one of your key duties as a company director is to promote the success of the company.[67] Therefore, adopting a TRM approach to improve the company's CSR would align with one of your duties and guarantee long-term financial success, whilst demonstrating your commitment to the company's social and environmental impact. Additionally, as a company currently operating within a common law system, it is important that it can adapt to societal pressures and that you, as a company director, are committed to the continuous improvement of the company in a dynamic business culture.

I hope you find this information useful. Please do not hesitate to contact me if you would like to discuss this matter further.

Yours sincerely,

General Counsel
Summit Solutions

[66] Waddock (n 41).
[67] Companies Act 2006 (n 7).

Bibliography

Case Law

- *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821
- *Item Software (UK) Ltd v Fassihi* [2004] EWCA Civ 1244
- *Percival v Wright* [1902] 2 Ch 421
- *Re D'Jan of London Ltd* [1994] 1 BCLC 561

French Legislation

- Code Civil 1804
- Code de Commerce 1807
- Loi Grenelle II 2010
- Loi NRE 2001
- Loi PACTE 2019
- Loi Sapin II 2016
- Loi de Vigilance 2017

Journal Articles

- Awa HO, Etim W and Ogbonda E, 'Stakeholders, Stakeholder Theory and Corporate Social Responsibility (CSR)' (2024) 9 International journal of corporate social responsibility <https://jcsr.springeropen.com/articles/10.1186/s40991-024-00094-y> accessed 6 September 2024

- Mokyr J, 'Regions and Industries: A Perspective on the Industrial Revolution in Britain' (2006) 22 Journal of Interdisciplinary History 1 <https://faculty.wcas.northwestern.edu/jmokyr/Baumol-volume.PDF> accessed 5 September 2024

- Permatasari P and Gunawan J, 'Sustainability Policies for Small Medium Enterprises: WHO Are the Actors?' (2023) 9 Cleaner and Responsible

Consumption 100122 <https://www.sciencedirect.com/science/article/pii/S2666784323000232> accessed 6 September 2024

- Redmond P, 'Directors' Duties and Corporate Social Responsiveness,' Vol 35(1), (2012): 317-339 <https://classic.austlii.edu.au/au/journals/UNSWLawJl/2012/13.pdf> accessed 5 September 2024

- Subhi Hamed R, Khalil Al-Shattarat B and Khalil Al-Shattarat W, 'The Impact of Introducing New Regulations on the Quality of CSR Reporting: Evidence from the UK' (2021) 46 Journal of International Accounting, Auditing and Taxation 100444 <https://pure.port.ac.uk/ws/portalfiles/portal/50274317/The_impact_of_introducing_new_regulations_on_the_quality_of_CSR_reporting.pdf> accessed 6 September 2024

- Waddock SA, Bodwell C and Graves SB, 'Responsibility: The New Business Imperative' (2002) 16 Academy of Management Perspectives 132 <https://journals.aom.org/doi/abs/10.5465/AME.2002.7173581> accessed 5 September 2024

Regulations, Directives and Codes

- AFEP-MEDEF Code of Corporate Governance for Listed Companies (Revised 2020)
- European Union's Directive on Shareholders' Rights II (2017/828/EU)
- European Union's Directive on Corporate Sustainability Reporting (2022/2464/EU)
- European Union's Directive on Financial Reporting (2013/34/EU)
- European Union's Directive on Non-Financial Reporting (2014/95/EU)
- European Union's Directive on Services (2006/123/EC)
- European Union's Directive on Transfer of Undertakings (2001/23/EC)
- European Union's Directive on Transparent and Predictable Working Conditions (2019/1152/EU)

- FRC, ‘UK Corporate Governance Code’ (*FRC (Financial Reporting Council)*2024) <https://www.frc.org.uk/library/standards-codes-policy/corporate-governance/uk-corporate-governance-code/> accessed 5 September 2024

- Market Abuse Regulation (Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse) [2014] OJ L173/1.

UK Legislation

- Bribery Act 2010
- Companies Act 1862
- Companies Act 2006
- Company Directors Disqualification Act 1986
- Insolvency Act 1986
- Joint Stock Companies Act 1844

Websites, Blogs and Reports (Credible)

- Alexander G and Donahue C, ‘Property Law - Property Law and the Western Concept of Private Property’ (*Encyclopaedia Britannica*11 May 2024) <https://www.britannica.com/topic/property-law/Property-law-and-the-Western-concept-of-private-property> accessed 5 September 2024

- Chinniah K, ‘Understanding the Penalties Associated with Non-Compliance in the Context of the CSRD: Current Status across European Countries – SustainZone Insights’ (*Sustainzone.co.uk*2 September 2024) <https://sustainzone.co.uk/blog/understanding-the-penalties-associated-with-non-compliance-in-the-context-of-the-csrd-current-status-across-european-countries/> accessed 6 September 2024

- D’Souza D, ‘How London Became the World’s Financial Hub’ (*Investopedia*29 July 2023) <https://www.investopedia.com/how-london-became-the-world-s-financial-hub-4589324> accessed 5 September 2024

- Editors History com, ‘Napoleonic Code Approved in France’ (*History*15 March 2024) <https://www.history.com/this-day-in-history/napoleonic-code-approved-in-france> accessed 5 September 2024

- Fauset C, ‘What’s Wrong with Corporate Social Responsibility?’ (2006) <https://corporatewatch.org/wp-content/uploads/2017/09/CSRreport.pdf> accessed 6 September 2024

- Laurence M and Rogaly K, ‘Stagnant and Unequal: How the UK Is an Outlier in Corporate Governance and Why That Matters | Briefing | Commonwealth’ (*Commonwealth.org*24 March 2023) <https://www.common-wealth.org/publications/stagnant-and-unequal-how-the-uk-is-an-outlier-in-corporate-governance-and-why-that-matters> accessed 5 September 2024

- Reed A, ‘The Importance of Corporate Reputation in Supporting Company Valuations and Accessing Capital - APCO Worldwide’ (*apcoworldwide.com*12 July 2023) <https://apcoworldwide.com/blog/the-importance-of-corporate-reputation-in-supporting-company-valuations-and-accessing-capital/> accessed 5 September 2024

- Thomson Reuters, ‘What Is the Definition of Common Law?’ (*legal. thomsonreuters.com*15 November 2022) <https://legal.thomsonreuters.com/en/insights/articles/what-is-common-law> accessed 5 September 2024

French-English Law Essay Prize 2024

Runner-up

To what extent do the duties and responsibilities of a company director, and the consequences of their breach, differ in the laws of France and England? What do these differences reveal with respect to the legal and business cultures of the two countries, and how, if at all, has history played a part?

This legal memo seeks to provide an understanding of how the duties and responsibilities of company directors, along with the consequences of their breach, differ between French and English law, offering insights into what these differences reveal about each country's legal and business culture, as well as the historical factors that have influenced them.

The analysis reveals significant contrasts between the two legal frameworks, particularly in the approaches used to regulate and enforce directors' duties, which highlight deeper differences in legal and business cultures (**1**). Nevertheless, recent developments in case law and corporate governance are gradually reducing this gap (**2**).

1. Divergence in Legal Frameworks and Remedies

First, England and France differ with respect to their general approach to regulation of directors' duties: detailed and comprehensive codification for the former; broad general principles for the latter, with this having direct consequences on directors' decision-making (**1.1**). Second, both countries offer different avenue of enforcement which is reflective of distinct legal and economic models (**1.2**).

1.1. Addressing Directors' Duties: Regulatory Approaches in England and France

Historically, England relied on common law principles to define directors' duties[1], often on a basis of analogy with rules applying to trustees[2]. They were typically divided into two categories[3]: the duty of care[4] rooted in the laws of negligence[5]; and the fiduciaries duties

[1] Cécile Le Gallou, Simon Wesley, *Droit anglais des affaires*, LGDJ, 2018, §982-§993.
[2] Paul L. Davies, Sarah Worthington, Eva Michelier, *Gower and Davies: Principles of Modern Company Law* (8th edition), Sweet & Maxwell, 2008, para. 16-2. See for example: Keech v. Sandford [1726] EWHC Ch J76.
[3] Klaus J. Hopt, "Conflict of interest, Secrecy and Insider Information of Directors, A Comparative Analysis", *European Company and Financial Law Review* (ECFR), vol. 10, nº 2, June 2013, pp. 167-193, p. 168; Paul L. Davies, *op. cit.,* para. 16-12; also adopted in the EU commissioned comparative study by Carsten Gerner-Beuerle, Philipp Paech, and Edmund Schuster (ed.), *Study on Directors' Duties and Liability in Europe*, 2013.
[4] Dorchester Finance Co v. Stebbing (decided in 1977 but reported in 1989) [1989] B.C.L.C. 498; Norman v. Theodore Goddard [1991] B.C.L.C. 1027; Re D'Jan of London Ltd, [1994] 1 B.C.L.C. 561.
[5] Paul L. Davies, *op. cit.,* para. 16-12.

which, in comparative company law, are often summarized under the heading of duty of loyalty[6]. However, the Companies Act 2006 marked a significant shift by codifying these duties[7], while still referencing common law principles[8]. Despite this significant – and controversial[9] – framework shift, the underlying spirit guiding the regulation of directors' duties remains unchanged: the pursuit of legal certainty and predictability[10]. The importance of certainty in business, first formulated by Lord Mansfield in 1774[11], was a guiding principle in the preparatory work for the 2006 codification, which sought to make common law rules more accessible to directors[12], who will "*then know what ground to go upon*"[13].

In contrast, France's legal framework takes a different approach. Instead of explicitly listing directors' duties, French law relies on overarching concepts and principles such as directors' liability for mismanagement[14], and the notion of corporate interest[15]. Admittedly, this is consistent with France's civil law legal tradition[16] – where lawmakers establish general legal principles, allowing for judicial interpretation to adapt to "*the multifaceted and changing characteristics of each company's business and environment*"[17]. It is perhaps more important to note that, especially in the context of regulating directors' actions, keeping key concepts

[6] Carsten Gerner-Beuerle, Philipp Paech, and Edmund Schuster, *op. cit.*, p. 118; also, Paul L. Davies, *op. cit.,* para. 16-12.
[7] Chapter 2 of Part 10 of Companies Act 2006 – *General Duties of Directors*; see Fraser Dobbie, "Codification of Directors' Duties: An Act to Follow?", *Trinity College Law Review* 11, no. 1, 2008, pp. 13-29.
[8] Sections 170(3) and 170(4) Companies Act 2006.
[9] Fraser Dobbie, *art. cit.*
[10] Cécile Le Gallou, Simon Wesley, *op. cit.*, §296-302.
[11] Vallejo v Wheeler [1774] 1 Cowp 143: "*In all mercantile transactions the great object should be certainty: and therefore, it is of more consequence that a rule should be certain, than whether the rule is established one way or the other. Because speculators in trade then know what ground to go upon*".
[12] The Law Commission No. 261 and the Scottish Law Commission No. 173, *Company Directors: Regulating Conflicts of Interest and Formulating a Statement of Duties*, Cm. 4436, 1999, see p. 32 et seq. Available on this link.
[13] Vallejo v Wheeler [1774] 1 Cowp 143, see footnote 11.
[14] "Faute de gestion" – *Code de commerce*, Articles L. 225-251 (for one-tier SA) and L. 225-256 (for two-tier SA), L. 225-257 (for supervisory board members).
[15] "Intérêt social" – *Code Civil*, Article 1833 as amended in 2019 by PACTE Law. On this provision, see Pierre-Henri Conac, "L'article 1833 et l'intégration de l'intérêt social et de la responsabilité sociale de l'entreprise", *Revue des sociétés*, 2019, p. 570. For the state of French law before the PACTE law, see Cécilia Dervogne "Directors' Duties and Liability in France" in Carsten Gerner-Beuerle, Philipp Paech, and Edmund Schuster (ed.), *op. cit.*, p. A 298 (Country Report for France).
[16] Gilles Cuniberti, *Grands systèmes de droit contemporain – Introduction au droit comparé* (5th edition), L.G.D.J., 2024, pp. 22 et seq.
[17] Explanatory Statement (*exposé des motifs*), Law n° 2019-486, 22 May 2019 (PACTE law), spec. under article 61. Freely translated: "*Les éléments nécessaires pour déterminer si une décision est ou non contraire à l'intérêt social dépendent en effet trop étroitement des caractéristiques, protéiformes et changeants, de l'activité et de l'environnement de chaque société.*" Available on *Légifrance* on this link.

such as the corporate interest undefined is intentional[18] and endorsed by French lawmakers[19]. By avoiding a rigid definition of the interests that directors must protect and refraining from permanently fixing behavioural expectations – whether regarding specific duties or the criteria for mismanagement[20] – lawmakers aim to create a level of *legal uncertainty* that would compel directors to carefully evaluate the consequences of their decisions[21]: "*we want company directors to ask themselves the question*"[22].

At this stage, what this divergence between English and French regulatory approaches to directors' duties reveals in terms of business culture, is the differing attitudes towards risk within each jurisdiction, and their impact on entrepreneurial spirit. The English approach, through codification of duties, operates on the principle that *minimum complexity* and *maximum accessibility* fosters *business competitiveness*[23]: once directors are aware of the rules and potential risks, they can navigate decision-making with greater confidence[24], reducing the need to constant expert input and thereby lowering costs[25]. In contrast, the French model, while intended to make directors carefully assess their actions, can also lead, to a more risk-averse and conservative mindset[26] potentially clashing with entrepreneurial drive[27].

---

[18] Dominique Schmidt, "Fasc. 25 - Actualité : LOI PACTE. – L'intérêt social", *JurisClasseur Commercial*, LexisNexis, 2019, §5 ; Jacques Buhart, "Intérêt social – quelle est la place de l'intérêt des actionnaires en droit français", *La Semaine Juridique Édition Générale* nº 1000, May 2011, p. 613.

[19] *Assemblée Nationale*, session of 5 October 2018, debates on article 61, see spec. Mrs. Coralie Dubost's interventions. Available on the *Assemblée Nationale*'s archive website, via this link.

[20] On the lack of definition or criteria of mismanagement, see Deen Gibirila, Hélène Azarian, "Fasc. 1053: DIRIGEANTS SOCIAUX – Responsabilité civile", *JurisClasseur Commercial*, LexisNexis, 2023, §21 et seq.

[21] Pierre-Henri Conac, *art. cit.*

[22] Free translation of MP Coralie Dubost's intervention during parliamentary debates (see footnote 19): "*J'ajoute que nous avons fait le choix d'introduire dans l'article 1833 du code civil d'introduire la notion d'intérêt social, accolée à celle d'enjeux sociaux et environnementaux, sous la forme d'une question. Nous n'introduisons pas une obligation de résultat : nous demandons aux chefs d'entreprise de se poser la question.*"

[23] The Law Commission No. 261 (footnote 12): "*Competitiveness requires the minimum complexity and maximum accessibility, both in terms of the substance of the law and the way in which it is communicated.*" See also the report by The Company Law Review Steering Group, *Modern Company Law for a Competitive Economy – The Strategic Framework*, 1999, §2.24. Available on this link.

[24] Fraser Dobbie, "Codification of Directors' Duties: An Act to Follow?", *Trinity College Law Review* 11, no. 1, 2008, pp. 13-29.

[25] The Company Law Review Steering Group, *Modern Company Law for a Competitive Economy – The Strategic Framework*, 1999, §2.24. Available via this link.

[26] Bruno Basuyaux, "Administrateurs et Loi Pacte : quelques réflexions générales", Journal des sociétés 4/2019, n° 173, p. 23 (cited in Pierre-Henri Conac, *art. cit.*) ; see also Cheik Galokho, "La faute de gestion et la prise de risque excessive", *Revue Lamy droit des affaires* Nº 161, July 2020, spec. §7 et seq.

[27] *Ibid.*

1.2. Comparing Sanctions and Enforcement Mechanisms

In England, the primary consequence of a breach of duty for company directors is the risk of a derivative action to be initiated by shareholders[28]. A notable feature of English law in this area is its procedural safeguard, which aims to prevent unnecessary litigation each time a breach of duty is arguable[29]. In fact, the reform of the derivative claim mechanism in 2006[30], introduced a requirement for shareholders to establish a *prima facie* case, after which the court assesses whether proceeding with litigation serves the company's interests[31]. This procedural filter was designed to protect company directors from disruptive and frivolous claims, allowing them to focus on day-to-day management without constant threat of litigation over short-terms results[32]. However, some commentators have suggested that the mechanism is overly burdensome for shareholders, making enforcement impractical[33]. Nevertheless, from the perspective of company directors, the fact that an external party such as a judge[34] might review their decisions fosters a sense of accountability through outside scrutiny[35], which would shape their decision-making. Furthermore, the English arsenal offers a comprehensive range of remedies – both common law and equitable[36] – which are highly effective in deterring potential wrongdoers[37]. An example of this is the account of profits measure supported by a constructive trust[38]. This allows for the tracing of profits and the recovery of subsequent reinvestments of the proceeds resulting from a breach of duty[39].

[28] Paul L. Davies, *op. cit.,* para. 17-1.
[29] Paul L. Davies, *op. cit.,* para. 17-1.
[30] Part 11 of the Companies Act 2006; for the mechanism as derived from the common law, see Foss v Harbottle [1843] 2 Hare 461, 67 ER 189.
[31] Frank Wooldridge and Liam Davies, "Derivative claims under UK company law and some related provisions of German law" *Amicus Curiae*, Issue 90, 2012, p. 5.
[32] Qamarul Jailani, "Derivative Claims under the Companies Act 2006: In Need of Reform?", *UCL Journal of Law and Jurisprudence*, Vol. 7, no. 2, 2018, pp. 72-100
[33] John Fentener van Vlissingen, "The Derivative Claim 15 Years on: A Quagmire of Incautious Dicta and Meaningless Statutory Protection", *Bristol Law Review*, 2022, p. 265-281.
[34] Paul L. Davies, *op. cit.,* para. 17-7.
[35] Arad Reisberg, *Derivative Actions and Corporate Governance: Theory and Application*, Oxford University Press, 2007, p. 74 (cited in Qamarul Jailani, *art. cit.*, p. 73).
[36] Section 178 Companies Act 2006.
[37] Marco Claudio Corradi, Geneviève Helleringer, "Self-Dealing, Corporate Opportunities and the Duty of Loyalty – a US, UK and EU Comparative Perspective", *European Corporate Governance Institute* - Law Working Paper No. 582/2021, April 2021. Available at SSRN: https://ssrn.com/abstract=3825745
[38] Marco Claudio Corradi, Geneviève Helleringer, *art. cit.* See also Holger Fleischer, "Legal Transplants in European Company Law – The Case of Fiduciary Duties", *European Company and Financial Law Review*, Vol. 2, No. 3, 2006, spec. p. 397. Available on this link (Universität Zürich).
[39] Marco Claudio Corradi, Geneviève Helleringer, *art. cit.*

While not its intended purpose[40], this remedy has an inherent psychological deterrence effect due to its long-term reach[41], thereby compelling directors to self-regulate.

In contrast, French law provides for the *action sociale ut singuli*[42], which serves as an equivalent mechanism to the derivative claim[43]. This mechanism entitles any shareholder to bring a claim against directors in breach of their duties[44], regardless of the number of shares held[45]. Unlike its English counterpart, this right is not subject to strict procedural hurdles[46]. However, this private enforcement tool is often seen as less attractive[47] due to the difficulty to establish and prove the mismanagement[48], the legal costs involved and the limited remedies available[49], particularly the prevalence of damages awarded to the company rather than to shareholders[50]. Perhaps more importantly however, French law imposes substantial criminal liability on directors, a feature that distinguishes it from other jurisdictions[51]. Indeed, it is often observed that French corporate law is highly criminalized[52]. For example, the crime of *abus de biens sociaux* which punishes the misuse of corporate assets in bad faith contrary to the company's corporate interest[53], demonstrates the high level of scrutiny directors face under criminal law. Prosecutors and courts closely examine the substance of directors' actions, often using criminal enforcement as both a deterrent and a means to recover damages[54]. France's inclination to criminalize corporate law stems from its *dirigiste* legal tradition[55] and its historical mistrust towards corporate actors, especially limited companies[56]. In order to

[40] See recently, in an IP infringement case: Lifestyle Equities CV and anor v Ahmed and anor [2024] UKSC 17.
[41] Marco Claudio Corradi, Geneviève Helleringer, *art. cit.*
[42] Article 1843-5 para. 1 of *Code Civil*; Article L. 225-252 of *Code de Commerce* (for SA).
[43] On the equivalent functions of the mechanisms see Martin Gelter, "Why Do Shareholder Derivative Suits Remain Rare in Continental Europe?", *Brook. J. Int'L L.*, Vol. 37, 2012, p. 843; and Carsten Gerner-Beuerle, Philipp Paech, and Edmund Schuster, *op. cit.*, p. 199 et seq.
[44] Articles L. 225-251 (for one-tier SA) and L. 225-256 (for two-tier SA) of the *Code de commerce*.
[45] Martin Gelter, *art. cit.*; Carsten Gerner-Beuerle, Philipp Paech, and Edmund Schuster, *op. cit.*, p. 199 et seq.
[46] Carsten Gerner-Beuerle, Philipp Paech, and Edmund Schuster, *op. cit.*, p. 205 et seq.
[47] Martin Gelter, *art. cit.*
[48] *Ibid.*, spec. p. 871.
[49] For a comprehensive analysis of all factors, see Martin Gelter, *art. cit.*
[50] Hélène Azarian, Deen Gibirila, *art. cit.*, §39.
[51] Martin Gelter, *art. cit.* p. 887.
[52] On this issue, see the report commissioned by the French *Garde des sceaux*: Jean-Marc Coulon (ed.), *La dépénalisation de la vie des affaires*, Collection des rapports officiels, 2008, Paris. Available on the Ministry of Justice's website via this link.
[53] Article L. 242-6 para. 3 of the *Code de commerce*.
[54] Martin Gelter, *art. cit.*, p. 889.
[55] Jean Carbonnier, *Droit et passion du droit sous la Ve République*, Forum Flammarion, 1996, pp. 143-144.
[56] Romuald Szramkiewicz, Olivier Descamps, *Histoire du droit des affaires* (3rd edition), L.G.D.J., §817 et seq.

protect economic integrity and societal values[57], directors have been held criminally liable for breach since the liberalization of the limited company form[58].

These discrepancies in enforcement and sanctions reflect contrasting visions of corporate accountability[59], namely one primarily oriented towards shareholders and the other towards the broader public interest. Furthermore, they reveal differences in the underlying legal and economic models of each country. English law, which promotes the uninterrupted progress of the company in line with its best interests, reflects a model aimed at fostering commercial pragmatism[60]. In contrast, the continued criminalisation of business in France points to a system still shaped by Colbertism[61] and the enduring influence of the state in corporate governance[62].

2. Convergence in Substance Despite Structural Differences

Despite the formal differences highlighted in the previous section, the substantive principles of English business law, particularly through their clarity and adaptability[63], have had a significant impact on civil law jurisdictions[64]. This is particularly evident in the way certain concepts from English corporate governance have been indirectly incorporated into French law by French courts (**2.1**). Another notable illustration of this cross-jurisdictional influence is the adoption of governance codes in France, which draw upon principles embedded in English law (**2.2**).

2.1. The Influence of English Law on French Jurisprudence

A first illustration of this influence can be found in the duty of care. In essence, this duty requires directors to invest sufficient time, diligence, and skill in the management of the company[65]. It is typically rooted in the laws of negligence[66] and broadly recognized across

[57] Romuald Szramkiewicz, Olivier Descamps, *op. cit*., §826.
[58] Law of 24 July 1867 on commercial companies; see Romuald Szramkiewicz, Olivier Descamps, *op. cit*., §834.
[59] On the subject, see Kevin Keasy, Mike Wright, "Issues in Corporate Accountability and Governance: An Editorial", *Accounting and Business Research* 23, 1993, pp. 291–303.
[60] In this sense see, Paul Paul L. Davies, *op. cit.,* para. 17-7.
[61] Romuald Szramkiewicz, Olivier Descamps, *op. cit*., §190.
[62] Jean-Marc Moulin, Cheik Galokho, "Fasc. 1350 : SOCIÉTÉS ANONYMES. – Gouvernance des sociétés", JurisClasseur Commercial, LexisNexis, 2023, §4.
[63] Cécile Le Gallou, Simon Wesley, *op. cit.*, §297 and §300.
[64] Holger Fleischer, *art. cit.*
[65] Carsten Gerner-Beuerle, Philipp Paech, and Edmund Schuster (ed.), *op. cit.*, p. 74.
[66] Paul L. Davies, *op. cit.,* para. 16-12.

European legal systems[67]. In England, section 174 of the Companies Act 2006 sets out a dual standard for directors' behaviour—objective (reasonable diligence expected from a director)[68] and subjective (the individual's specific skills and experience)[69], originally established in common-law[70]. By contrast, French law does not include an explicit statutory provision for a director's duty of care. While the *Code de commerce* outlines liability for statutory violations and mismanagement[71], it does not formally codify the duty of care for directors. However, French courts have indirectly incorporateed this duty through the notion of "mismanagement" (*faute de gestion*)[72], which inherently requires an assessment of directors' conduct in accordance with standards of prudence and diligence[73]. Over time, French judges have effectively applied a standard similar to the English duty of care[74], often based on objective criteria (what a reasonable director would do) and the director's personal skills[75]. This practice, though not codified, suggests a subtle borrowing from the common law framework[76], underscoring the influence of English law on French jurisprudence in the area of directors' duties.

An additional illustration of this can be seen in the context of corporate opportunity doctrine: English rules in this regard, which are rooted in the common law[77] and now enshrined in the Companies Act[78], strictly forbid directors to make any unauthorized profit from the exploitation of an opportunity that belongs to the company[79]. The rules are conceived as proprietary protection rules of the company's assets, which include business opportunities[80].

---

[67] Klaus J. Hopt, *art. cit.*, p. 168; Carsten Gerner-Beuerle, Philipp Paech, and Edmund Schuster (ed.), *op. cit.*, p. 78.
[68] Section 174(2)(a) Companies Act 2006.
[69] Section 174(2)(b) Companies Act 2006.
[70] *Dorchester Finance Co v. Stebbing* (decided in 1977 but reported 1989) [1989] B.C.L.C. 498; *Norman v. Theodore Goddard* [1991] B.C.L.C. 1027; *Re D'Jan of London Ltd*, [1994] 1 B.C.L.C. 561.
[71] Articles L. 223-22 and following for SARLs; L. 225-251 and following for the one-tier SA; L. 225-256 for the management board and L. 225-257 for the supervisory board.
[72] Deen Gibirila, Hélène Azarian, *art. cit.*, §21 et seq.
[73] Véronique Magnier, "Qu'est-ce qu'un administrateur 'prudent et diligent' ?", *Bull. Joly Sociétés* 2012, p. 75.
[74] Didier Martin, Mathieu Françon, "Responsabilité des administrateurs – Les juges français appliquent-ils les principes du *duty of care* (sans le savoir) ?", *Actes Pratiques et Ingénierie Sociétaire* nº 135, Mai-Juin 2014, dossier 3, §4-5 ; Jean-Jacques Daigre, "Le petit air anglais du devoir de diligence des dirigeants", *Le juge et le droit de l'économie – Mélanges en l'honneur de Pierre Bézard*, 2002, Montchrestien, p. 79
[75] See for instance Court of Appeal of Paris, 29 December 1934, *Recueil Sirey* 1935, 2, p. 61; Court of Cassation, 10 May 1948, *Recueil Dalloz* 1948, p. 407, where the Court referred to the director's "perceptiveness".
[76] Didier Martin, Mathieu Françon, *art. cit.*
[77] Regal (Hastings) Ltd v Gulliver [1942] UKHL 1, [1967] 1 All ER 378, [1967] 2 AC 134.
[78] Section 175(2) Companies Act 2006. For the scope of section 175, see Paul L. Davies, *op. cit.,* para. 16-63.
[79] Marco Claudio Corradi, Geneviève Helleringer, *art. cit.*; David Kershaw, "Does It Matter How the Law Thinks about Corporate Opportunities", *25 Legal Stud.*, 2005, p. 533.
[80] Marco Claudio Corradi, Geneviève Helleringer, *art. cit*.

French law, however, only recognizes a general duty not to compete with the company[81] – also known as the duty of loyalty *toward the company*[82]. This duty originally conceived as a judicial limitation to the overarching principle of freedom of trade and enterprise[83]. Here again, despite the two set of rules serving the same core economic function[84], they do not entirely overlap. This is because the French *patrimoine* theory does not recognize a business opportunity as an asset that the company is entitled to appropriate[85]. It is therefore conceivable for a French director to take a corporate opportunity without setting up a competing activity[86]. However, it is precisely to address this conflicting situation that the *Cour de Cassation* extended the general duty to the issue of directors overstepping the company by purchasing assets of interest to it[87]. The influence of the English corporate opportunity doctrine was quickly spotted[88]. Indeed, some scholars referred to a legal transplant of the English model in French caselaw[89].

2.2. Soft Law in France: Adopting British Principles in Corporate Governance

Despite the significant divergences between French and English law, the development of corporate governance in France also tends to narrow this substantive gap. In fact, corporate governance codes in France, such as the AFEP-MEDEF Code for listed corporations[90] and the Middlenext Code for smaller companies[91], incorporate principles that reflect a high degree of alignment with English directors' duties[92]. For instance, with regard with the duty of care, both

[81] Court of Cassation, Commercial Chamber, 24 February 1998, nº 96-12.638; Court of Cassation, Commercial Chamber, 12 February 2002, nº 00-11.602

[82] Laure Nurit-Pontier, "Fasc. 45-10 : Devoir de loyauté", *JurisClasseur Sociétés Traité*, LexisNexis, 2022, §33 et seq.

[83] For instance, Court of Appeal of Rennes, 29 June 2010, nº 09/05135, Guillemot v. Coste, in *Droit des sociétés* nº 2, February 2012, comm. 25 by Myriam Roussille; see also Laure Nurit-Pontier, "Fasc. 45-10 : Devoir de loyauté", *JurisClasseur Sociétés Traité*, LexisNexis, 2022, §39.

[84] Carsten Gerner-Beuerle, Philipp Paech, and Edmund Schuster, *op. cit.,* see spec. 149.

[85] Julien Koch, "Law of corporate opportunities: A comparative analysis", *Revue Droit & Affaires* n° 13, February 2016, dossier 9.

[86] Marco Claudio Corradi, Geneviève Helleringer, *art. cit*.

[87] Court of Cassation, Commercial Chamber, 15 November 2011, nº 10-15.049; see also Court of Cassation, Commercial Chamber, 18 December 2012, nº 11-24.305.

[88] Geneviève Helleringer, "Le dirigeant à l'épreuve des opportunités d'affaires", *Recueil Dalloz*, 2012, p. 1560 ; Jean-Marc Moulin, Cheik Galokho, *art. cit.*, §75

[89] Marco Claudio Corradi, Geneviève Helleringer, *art. cit*. More generally on the subject, see Holger Fleischer, *art. cit.*

[90] Available in English on this link. For an overview of the Code's evolution, see Jean-Marc Moulin, Cheik Galokho, *art. cit.*, spec. §32 et seq.

[91] Available in English on this link.

[92] Jean-Marc Moulin, Cheik Galokho, *art. cit.*, §60-67 ; Gérard Charreaux, Peter Wirtz, "Corporate Governance in France", *Cahier du FARGO*, 2007.

the 2022 AFEP-MEDEF and 2021 Middlenext codes emphasizes the duty of directors to have sufficient knowledge of the company's activities by attending or requesting appropriate training[93]. This echoes the knowledge aspect of the duty of care as set out in the *Barings* case which established that "*directors have, both collectively and individually, a continuing duty to acquire and maintain sufficient knowledge and understanding of the company's business to enable them to properly discharge their duties as directors*"[94]. With regard to fiduciary duties, an example would be the importance of disclosing, preventing and managing conflicts of interest as highlighted in both codes[95], which are based on the fiduciary duty of loyalty[96]. This is particularly important as these soft law rules on conflict of interests complement the French hard law regime on "*conventions réglementées*"[97] (self-dealing) and which, currently, gives no role to the duty of loyalty[98]. In fact, it has been argued that, in contrast with the English approach to self-dealing[99], French rules are more focused on adherence to procedural safeguards – the five-step approval process[100], shaped by the influence of EU regulations and harmonization agenda[101], than on the substantive assessment of the merits of the transaction that fiduciary duties toward the company would prescribe[102]. In this context, corporate governance's import is a valuable addition to French law.

Overall, the main duties contained in the French corporate governance codes are very close to those embedded in English law[103]. While this has been made technically possible because general concepts like fiduciary duties are flexible enough to adapt to local particularities[104], this alignment, driven by the pressures of global markets and investor expectations[105],

[93] AFEP-MEDEF Code (2022), section 14.1; Middlenext Code (2021), recommendation 5.
[94] *Re Barings plc* (No. 5) [1999] 1 BCLC 433, confirmed [2000] 1 BCLC 523, CA.
[95] Middlenext Code (2021), recommendations 1 and 2; AFEP-MEDEF Code (2022), section 21 but see also sections 2.4, 6.3 and 10.5.
[96] Jean-Marc Moulin, Cheik Galokho, *art. cit.*, §68.
[97] Article L. 225-38 and L. 225-40 (for one-tier SA), and L. 225-86 and L. 225-88 (for two-tier SA) of the *Code de commerce*.
[98] Marco Claudio Corradi, Geneviève Helleringer, *art. cit*.
[99] Section 177 of Companies Act 2006; see Paul L. Davies, *op. cit.,* para. 16-42 and 16-43. See also Marco Claudio Corradi, Geneviève Helleringer, *art. cit*.
[100] For an overview, see Hélène Azarian, "Synthèse – Sociétés Anonymes", *JurisClasseur Commercial*, LexisNexis, 2023, §26 et seq.
[101] Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement.
[102] Marco Claudio Corradi, Geneviève Helleringer, *art. cit*.
[103] Jean-Marc Moulin, Cheik Galokho, *art. cit.*, §28.
[104] Holger Fleischer, *art. cit.*
[105] See for example: OECD, *G20/OECD Principles of Corporate Governance*, OECD Publishing, 2015, Paris. Available on: http://dx.doi.org/10.1787/9789264236882-en.

illustrates a narrowing of legal divergences between England and France through soft law frameworks[106].

To conclude, while corporate governance has brought the French and English legal systems closer, they continue to evolve within fundamentally distinct economic frameworks shaped by their respective histories. England's legal approach is closely tied to financial markets[107], fostering a system driven by shareholder value[108]. In contrast, France operates within a model characterized by a significant role for the public and semi-public sectors in its economy[109] a by a centralisation of elite formation[110], with frequent movement between the private and public spheres[111]. While regulatory pathways in both countries have intersected at various points in History, exchanging legal and business cultures, as illustrated by the Cobden–Chevalier Treaty[112], their evolution proceeds at distinct paces[113].

[106] On the global phenomenon of corporate governance convergence, see Guido Carati, Alireza Tourani Rad, "Convergence of corporate governance systems", *Managerial Finance*, Vol. 26 No. 10, 2000, pp. 66-73.
[107] Brian R. Cheffins, "Law, Economics And The UK's System Of Corporate Governance: Lessons From History", Journal Of Corporate Law Studies, June 2021, p. 71.
[108] Klaus J. Hopt, *art. cit.*, Jean-Marc Moulin, Cheik Galokho, *art. cit.*, §4.
[109] Jean-Marc Moulin, Cheik Galokho, *art. cit.*, §4.
[110] The Economist, "All together now – Is there something wrong with France's business culture?", 21 March 2022
[111] Jean-Marc Moulin, Cheik Galokho, *art. cit.*, §4.
[112] Romuald Szramkiewicz, Olivier Descamps, *op. cit.*, §826 and also §191 et seq.
[113] Romuald Szramkiewicz, Olivier Descamps, *op. cit.*, §189.