Corporate social responsibility as groundwork to impose social duties on platforms, a possible reconciliation between economic freedom and social law?

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Abstract. *This article assesses the effectiveness, relevance, and future of corporate social responsibility (CSR) as a groundwork to impose social duties on platforms. After analyzing the concept of CSR within the more general context of soft law in terms of efficiency and legitimacy, this article assesses the ability of the French legislation to achieve a social protection goal.*

Summary in 3 pages

I. Introductory remarks: specificities of platforms and possible analogies

In the extremely liberal and evolving context of digital intermediation of platforms activities, this article assesses the instrument of Corporate Social Responsibility (CSR) to reconcile economic freedom and social law. An analysis of the platforms' specificities allows drawing possible analogies with transnational companies and corporate social responsibility. The first specificity of platforms is that technology enables the creation of micro-businesses. This creates an outsourcing phenomenon and a vertical disintegration of the enterprise. The second innovation is that the intermediate i.e., the platform, outstrips the traditional position of the suppliers towards their customers. The third specificity is that the technology offers to the individuals an active role, not only as a customer, but also as a supplier or service provider. These specificities are the motto of the platforms in their liberalist business approach and justifies their disengagement from the labor relationship. Like transnational companies before them, corporate social responsibility and compliance could maybe overcome the extraterritoriality of their activity. So, this article assesses the effectiveness, relevance, and future of corporate social responsibility as a groundwork to impose social duties on platforms. To do so, we will answer two questions: Can CSR impose social duties to companies? Can the state delegate social security to companies through CSR?

II. From soft law to hard law: CSR as an instrument of social duties

An emblem of the soft law, CSR is a voluntary, enterprise-driven initiative in which companies state their principles and values in their internal processes and in their interaction with other actors. It's not legally binding. But because it indirectly validates the behavior of its addressee it contains a permissive effect, which allows to categories it as a normative instrument. The assessment of CSR will start in terms of effectiveness, and legitimacy then it will consider the binding effects of CSR.

A. Effectiveness and legitimacy of CSR

Assessment in terms of legitimacy. *Philosophically, legitimacy aims at something fair. Formally, it means that the norm respects the democratic principles and belongs to a legal order in consideration of its author. Because soft law implies the voluntary adherence of its recipients, its legitimacy depends on the involvement of the actors concerned in its elaboration. For this reason, soft law benefits from a presumption of legitimacy provided that it respects the parliamentary power.*

Assessment in terms of effectiveness. *Soft law can only be useful if it's effective. We need to clarify the expectations behind the term effectiveness as opposed to efficiency. Both measure the effects, but "efficiency" includes a utilitarian dimension. It postulates a link of adequacy between the objective, and the result obtained: the effects. Where "Effectiveness" measures only the reality*

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of the effect, its impact on behaviors. Without effectiveness, CSR is a marketing tool; it can't become a normative instrument. Our instrumental perspective doesn't assess the quality of social protection, or the political choices, which refers to efficiency. It focuses on effectiveness.

According to the OECD, one of the companies' motives in adopting CSR is to limit the legal risk induced by their activities. So, CSR aims at producing legal effects. As lawyers, when we look at CSR, we must not forget that the word "responsibility" contrary to the French word "responsabilité" has only a moral meaning. Only the term "liability" has legal consequences and the effect to hold somebody accountable. So we must temper our expectation of legal effects. In terms of effectiveness, soft law often appears more an obstacle than as an asset. It is criticized for its sources' fragmentation or for its imprecision, which leads to legal insecurity. We can also mention its low binding effects and predictability. Consequently, it appears as responsible for degrading the quality of the law. However, according to the scholarship, soft law amplifies hard law for three reasons. First, it has an accompanying function. It details or completes an imprecise law, it is clearer. Second, it fulfills a function of evaluation: here it intervenes in parallel with hard law. Third, when hard law doesn't yet exist, soft law has an experimental function. It prepares the recourse to hard law and can apprehend new economic realities. As a consequence, soft law has been introduced into hard law mechanisms as a complementary instrument. Within this context the French Council of State has set three conditions to recognize for soft law as effective. Soft law must incur sanctions or have negative consequences. Control mechanisms must be implemented to detect breaches. It must not involve uncertainty as to its effects or imply highly negative impacts for third parties. So, CSR is legitimate and effective in playing a subsidiary role when certain conditions are met. This role has gradually evolved.

B. Hardening mechanisms of CSR

Juridification process. *If the alleged objective of companies is moral. CSR also implies a pledge by the company to observe the principles it contains and to require its partners to do so. Behind the moral motive, the most interesting aspect of CSR lies in its juridification, i.e., implementation through contractualization. By using contractual clauses and their power, companies go beyond the territorial norms. Soft law becomes a legally binding agreement with extraterritorial effects.*

Normative shifts through compliance processes. *Another interesting aspect of the hardening mechanisms is that CSR has gradually become the subject of a normative shift thanks to compliance. Initially used in the fight against corruption, then in data protection, compliance is now developing in social responsibility. Compliance consists of all the measures and procedures that an entity must implement to ensure they respect legal standards. It forces companies to communicate on their application of a code of conduct and to justify any deviation. Compliance implies that the authorities impose its implementation but transfer its control to companies. Many examples show this normative shift. One of them lies in CSR's definition. In 2011, the European Commission removed the word "voluntary" to the definition and added that the "respect for applicable legislation, and for collective agreements between social partners, is a prerequisite for meeting that responsibility". In that sense, we can't oppose soft law to hard law, it would represent a misleading conception of normative density.*

In conclusion, through the contractual instrument, CSR can reconstitute the "de facto" unity between platforms and their partners. It overcomes the territorial compartmentalization. Moreover, the takeover of self-regulatory compliance and its incorporation into hard law allows CSR to produce an extraterritorial effect. So, by a bottom-up approach of the normative hierarchy, CSR opens the way to co-regulation mechanisms, i.e., self-regulation controlled by the State. From a subsidiary role CSR has become a tool of cooperative regulation. The objective of the third part is to assess the use of CSR, through the French example, not in human social rights but in social law.

III. Application of soft law to social security: cross analysis with the French CSR

At a time when no regulations were yet in place in other European countries, the French government relied on social responsibility of platforms to grant certain rights to self-employed

platform workers. These rights are integrated into the French Labor Code in a Part VII dedicated to listed professions and activities. Contrary to the other listed professions, the law refers to the status of self-employment for platform workers, although workers can challenge this qualification. This status, with a very light social protection, aimed at encouraging a promising economic sector with more flexibility. We will first present this regime, then we will assess it.

A. Presentation of the legal platforms' social responsibility

General regime of social responsibility. *In 2018, the French government introduced a social responsibility for all electronic platforms of intermediation, which determine the characteristics of the service and set its price. First the platform has to reimburse the voluntarily occupational accident insurance premium paid by its workers who achieve a minimum turnover around €5,300 p.a. (social security ceiling). The platform can avoid this reimbursement if it has concluded a private insurance for occupational accident. Second the platform must bear the costs for loss of income during professional training. Third the self-employed workers can organize "strikes" (named "coordinated refusal to provide the services") and to form trade unions to assert their interests. The combination of these disparate protection elements seems to lack of consistency.*

Specific self-regulation for platforms of transportation. *In 2020, the Mobility Orientation Act (LOM) introduced into the Labor Code a principle of self-regulation for transports' platforms through social charter. For those platforms, the law exemplifies eight measures that they can adopt to improving the working conditions. For example, organizing absence of exclusivity, setting decent prices for the services (i.e., salaries), implement a social dialog, or a supplementary social protection… The charter can obtain a certification by the authorities (the executive power). In such a case, the platform has to consult the workers during its elaboration. By this certification, the law intended to grant an irrevocable guarantee against a reclassification as an employee in return to the working conditions' improvement. But the Constitutional Council has judged this provision contrary to article 34 of the French Constitution, which assigns to the legislator (not the executive power) the task to determine the principles of labor law, trade union law and social security.*

Besides this self-regulation, the LOM introduced a complement of hard law in the Transport Code, to increase protection and transparency. For example, before each service acceptance, the drivers must be informed on the distance covered and the minimum price guaranteed. They can refuse the service without any penalty or breach of contract. They can choose their working hours and periods of inactivity and can disconnect during working periods without breaching the contract. Finally, the platform must publish the average duration and income of the workers' activities.

B. Assessment of the French system's effectiveness and legitimacy

Effectiveness and legitimacy of the charters. *The legislator has granted the charters several forms of normative guarantee: a contractual value by integration into the general conditions; justiciability, which ensures legal effects. However, several negative aspects change the result of this assessment. In terms of legitimacy, the charters are only optional and discretionary in their adoption. They aim at improving the working conditions, but they don't have the strength of a collective labor agreement because the consultation lacks effectiveness. Yet they produce mandatory effects for all workers by inclusion in the terms and conditions. The high constitutional jurisdiction has dismantled this State consecration by certification, which gave its legitimacy to the charters, because it contravened with the French constitution's high principle of separation of powers. The control mechanism resulting from the certification proves unsatisfactory. The commitments in the charter are close to those typical of labor law. So, the more protective and precise the charter, the higher the risk of reclassification. This risk is counterproductive regarding the effectiveness of protection. Regarding the sanction, the charter doesn't contain direct sanctions. An indirect sanction can always happen if people invoke an abuse of rights. But here the only "attractive" sanction is a reclassification if the platform intervenes "too much" in the contractual relationship. So, the sanction is also counterproductive for the protection.*

Effectiveness and legitimacy of the platforms' social responsibility. *We come to a similar conclusion regarding the general regime. Because the workers are assigned to the self-employed status, labor law doesn't encompass them. Deprived from its reference of labor law, the occupational accident insurance is disconnected to social security. It switches the system to a risk and private insurance where equal treatment, solidarity, and universality aren't mandatory. Privatization of a social insurance goes against the rules of financing social security. It prevents correcting social inequalities by transferring costs to another social group. It could even encourage platforms to maintain precariousness to benefit from threshold effects of the annual social ceiling. The choice of self-employment status also limits the role of the social partners. Indeed, the European Competition law prohibits tariff agreements on the price of labor between companies. So, the social rights must limit to working conditions, excluding minimum wages or tariff agreements. It affects both effectiveness and legitimacy. The avoidance of labor law has generated legal risks, so the assessment proves negative.*

IV. Conclusion

Does this mean that States cannot delegate social security through CSR? Using the above arguments, we can say that CSR becomes effective and legitimate when it contains sanctions and respect the democratic process. It can transcend the territoriality of labor law. Even in the domain of State competencies like social security a certain delegation of competence to companies is possible thanks to the compliance process. On the contrary, privatization of social security would destabilize the whole system. So backed up by a system with solid foundations, CSR could become a pragmatic choice. Social responsibility could be the last stone brought to the edifice not its corner stone.

I. Introductory remarks

1. **The outsourcing of work, a common point between transnational companies and digital platforms.** Today, the network enterprise has replaced the Fordist enterprise. These enterprises only produce by themselves the work they can't outsource.[2] This phenomenon of outsourcing and vertical disintegration generates new labor relations, governed by commercial law. However, while workers see their legal rights diluted under the guise of autonomous or independent work and henceforth assume the risks of work, the companies are still in a position of power and perceive the benefits.[3] Whether national or multinational, digital platforms gather in many ways transnational network enterprises with their corporate and contractual production chains. It is therefore not illogical to foresee for platforms, as for transnational enterprises, a form of social responsibility as the groundwork of their social commitments to workers. Like transnational companies before them, digital platforms have taken a step towards outsourcing and vertical disintegration thanks to artificial intelligence and data processing.

2. **The use of personal data at the heart of the digital platforms' business model.** The first innovation brought by platforms is that technology potentially offers the individual an active role, not only as a consumer, but also as a supplier, producer or service provider. This technology enables the creation of micro-businesses. The second innovation is that the platform, i.e., the intermediary, now

[2] Supiot, *Les nouveaux visages de la subordination*, Droit Social, n°2, February 2000, p.135-145 and Witzig, *Ressorts méconnus du droit du travail*, in : WYLER/MEIER/MARCHAND (édit.) *Regards croisés sur le droit du travail : Liber amicorum pour Gabriel Aubert*, Schulthess éd. romandes, Geneva, 2015, p.356-357.
[3] A. Supiot, *Les nouveaux visages de la subordination*, Droit Social, n°2, February 2000, p.135-145.

outstrips the traditional position of suppliers.[4] This transfer of economic power is the result of the personal data's commercial exploitation: the positioning of users, the state of traffic, and more generally the perfect knowledge of supply and demand. Consequently, the regulation of the platforms' economic relations raises the same sorts of problems than any other digital operators has created in the past. Analogies can be made, because despite the diversity of their functions and their business models, these companies belong all to data industries. Data, which is the raw material obtained almost free of charge by "detaching it from its physical or intellectual counterpart."[5] This gratuity and the use of technology form the core of these companies' financial equilibrium.[6]

3. **The need for governments to counterbalance the strategy of digital platforms' disengagement from the labor relationship.** A new form of activity has emerged: the intermediation of work. With the advent of digital platforms, work has become a task, a commodity regulated by algorithms that can be traded. In theory, platforms are only mediating tools working thanks to and through the will of their users. This discourse justifies their disengagement from the labor relationship. However, in practice platforms play a leading role, thanks to their control on digital data and an infinite reservoir of workers and they use this power to develop their clientele and establish their market shares. Qualifying platforms' workers as self-employed allow platforms to liberalize the employer-employee relationship and free themselves from the boundaries imposed by labor law. Traditional labor law, built on the physical production company and its employees, can't deal with these instant relationships. In response to these changes in the productive system, some authors propose to imagine solutions as innovative as their inventiveness, rather than trying to bend the outdated concepts of labor law. According to Alain Supiot, states now must rethink their labor law if they want to "build on internationalization rather than give in to globalization."[7] It is in this spirit that we suggest taking up this futuristic challenge. Because the rise of globalization generates both an erosion of sovereignty[8] and growing expectations towards the States in all socio-economic fields[9], the resulting entanglement of the competences requires them to go beyond their traditional instruments. Thus, our study will be at the crossroads between social law and social rights[10], between domestic and international law, between public and private liability.

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[4] Azaïs/Dieuaide/Kesselman, *Zone grise d'emploi, pouvoir de l'employeur et espace public : une illustration à partir du cas Uber*, Relations industrielles, vol.72(3), 2017, p.445ss.

[5] Frison-Roche, *L'apport du droit de la compliance à la gouvernance d'internet Rapport commandé par Monsieur le Ministre en charge du Numérique*, April 2019, p.27. Disponible sur https://www.economie.gouv.fr.

[6] Frison-Roche, *L'apport du droit de la compliance à la gouvernance d'internet Rapport commandé par Monsieur le Ministre en charge du Numérique*, April 2019, p.27.

[7] Supiot, *Les nouveaux visages de la subordination*, p.135-145, Droit Social, n°2, February 2000. According to M.-A. Frison Roche, the term "Globalization" aims at a radically new phenomenon, made of economic exchanges without any constraint of time or place, concerning goods without corporality since they are information. Cf. Frison-Roche, *Liste des 100 Mots*, in : Frison-Roche (éd.), *Les 100 mots de la régulation.* PUF, « Que sais-je ? », Paris, 2011, pp.5-126.

[8] Arnaud, *Les transformations de la régulation juridique et la production du droit*, in : Clam/Martin (dir.) *Les transformations de la régulation juridique*, Paris, LDGJ, 1998, p.76-80.

[9] Mekki, *Propos introductifs sur le droit souple*, in : Association Henri Capitant, *Le droit souple Journées Nationales* t. XIII, Paris, Dalloz, 2009, p.19.

[10] By social law, in this study, we mean labor law, whether public, private or collective, and social security law, also referred to in Switzerland as social insurance law and the term social rights will refer to the economic, social and cultural rights enumerated in the International Covenant on Economic, Social and Cultural Rights concluded in New York on December 16, 1966 (UN Covenant I) (RS 0.103.1).

4. **Corporate social responsibility, a vector for globalized social law.** While economic exchanges are based on binding international or regional norms, economic powers have approached the regulation of labor relations and the societal, environmental, and human impact of transnational companies' activities under a soft law perspective. Like soft law, to which it belongs, corporate social responsibility (CSR) constitutes a normative horizon providing a social dimension to economic globalization. Both are founded on numerous and various tools, actors, and concepts, of different strengths and nature, which allows them to go beyond borders by creating a hybrid, half-private, half-public law.[11] Initially conceived unilaterally by companies, for example in codes of conduct, sometimes by associating trade union actors in framework agreements, or even public actors, they shape globalized industrial relations in a more or less effective way. It is by using such means that French legislation has regulated, in an avant-garde and experimental method, the labor relations of digital platforms in the framework of the 2016 and 2019 laws[12]. However, expecting these companies, queens of evasion, to take a voluntary and responsible approach seems at the very least paradoxical if not utopian.

5. **Methodology.** This article is a prospective and exploratory exercise. It follows other researchers' trends who consider the digitalization of relationships ought to change the way the law perceives them. We conduct our examination from the outside. We examine if by a different glance and another culture, analogies can emerge and generate viable technical solutions.[13] Indeed in the extremely liberal and evolving context of digital intermediation, our objective is to propose solutions that reconcile economic freedom and social law. To achieve this goal, we have chosen an interdisciplinary and comparative approach, at the risk of simplifying some issues. The objective therefore isn't to study each soft law instrument (we couldn't do this in a lifetime) or soft law generally (we will only touch upon the subject). The objective is to assess the efficiency, relevance and future of CSR as a groundwork for social duties on platforms.

6. **Structure.** After having analyzed the characteristics of soft law in terms of effectiveness, efficiency, and legitimacy, we will study its application in CSR (II). Then we will set up the tools that let us evaluate, through the French example, the ability to achieve a social protection through those means (III). In a concluding section, we will summarize the conditions that CSR should meet to achieve such a goal (IV).

II. From soft law to hard law: CSR as an instrument of social duties

7. For many years the monopoly of public international law, soft law has gradually developed in domestic law.[14] For some years now, the authorities have been

[11] Dugareilh, *La Responsabilité sociale de l'entreprise, vecteur d'un droit de la mondialisation?* Bruxelles, Bruylant, p.9.

[12] Loi n°2016-1088 from 8 August 2016 and Loi n°2019-1428 from 24 December 2019.

[13] Frison-Roche, *L'apport du droit de la compliance à la gouvernance d'internet Rapport commandé par Monsieur le Ministre en charge du Numérique*, April 2019, p.6.

[14] According to J.-M. Sorel, the soft law has imposed itself from the start in international law because of the absence of a single, unified and centralized legal order and the need to transcend borders. It is part of the genes of international law. Cf. Sorel, *L'indifférence de la doctrine interne à la discipline internationale et réciproquement : orgueil et préjugés ?*, in : Deumier/Sorel (dir.) *Regards croisés sur la soft law en droit interne, européen et international*, Paris, LGDJ, 2018, p.9.

considering soft law as an auxiliary to hard law because of its usefulness and complementarity, thus recognizing its legitimacy (A). CSR specifically has been the implemented thanks to mechanisms of hard law (B).

A. Legitimacy and effectiveness of soft law used in domestic law

8. The diversity of soft law acts and their names makes it necessary to define the characteristics of soft law mechanisms. For this article, we first have compared those characteristics identified by the scholarship − mainly internationalist − and the echo given to them by domestic law (1). Then we will discuss the expectations that the concepts of effectiveness and legitimacy raise (2).

1. Soft law, a polymorphous and polysemic concept

9. **Notions of soft law from an international perspective.** According to the scholarship, soft law norms or "collaborative law instruments" are texts whose normative scope is limited. Either the instrument containing the norm is flexible: they use the phrase "formal soft law"; or the norm itself is flexible or imprecise: they refer to "material soft law."[15] The material soft law has been analyzed, particularly in the study of regulation. Authors distinguish slack law (*droit mou*), which doesn't create rights or obligations for its recipients, and smooth law (*droit doux*), which isn't legally binding.[16] Concerning formal soft law, the scholarship proposes a dichotomy between primary soft law, which sets the norms, and secondary soft law, produced by control or enforcement bodies[17]; or between para-law, which is an alternative to classical regulation, and post-law, which is an interpretative and decision-making instrument.[18] Only formal soft law will concern us to assess the relevance of soft law as a vector of social protection. [19] Because of our instrumental perspective, we will override material soft law referring to the protection's quality, which depends on the efficiency of political choices.[20]

10. **Normative soft law in domestic law.** The notion of soft law has long been ignored by domestic law, which saw in it an abuse of the "legal rigor[21]," a fragmentation leading to responsibilities' dilution.[22] It was approached only ten years ago as a normative phenomenon.[23] It includes legal instruments that lack legally binding effects, but are nevertheless normative, because they aim to guide

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[15] *Soft law*, in : Salmon (dir.*), Dictionnaire de droit international public*, Bruxelles, Bruylant, 2001, p.1039.
[16] Delmas Marty, *Introduction : Le mou, le doux et le flou sont-ils des gardes-fous ?*, in : Clam/Martin (dir.) *Les transformations de la régulation juridique*, Paris, LGDJ, 1998, p.209-220 et Thibierge, *Le droit souple réflexion sur les textures du droit*, RTDCiv. 2003 p.599-628.
[17] Shelton, *Law, Non-Law and the Problem of "Soft Law,"* in Shelton (édit.), Commitment and compliance: The role of non-binding norms in the soft law, Oxford University Press, 2003, pp. 10-18.
[18] Vilaras, *Réflexions sur la légitimité et la légitimation de la « soft-law » en droit de l'Union européenne,* in Iliopoulos-Strangas/Flauss (edits.) La soft law des organisation européennes, Actes du 7è congrès de la SIPE, Baden-Baden/Bern, Nomos/Stämpfli Verlag, p.403-406.
[19] Flückiger includes under the notion of cooperative instruments both those, which emanate from private persons and those, which include in the agreement a public or semi-public entity. Flückiger, *(Re)faire la loi, Traité de légistique à l'ère du droit souple*, Bern, Stämpfli Editions, p.331.
[20] Cf. infra § 12 and § 28.
[21] Thibierge, *Rapport de synthèse*, in : Association Henri Capitant, *Le droit souple*, *Journées nationales*, t.XIII, Paris, Dalloz, 2009, p.141-163.
[22] Mekki, *Propos introductifs sur le droit souple,* in : Association Henri Capitant, *Le droit souple Journées Nationales* t. XIII, Paris, Dalloz, 2009, p.21.
[23] Cf. for example the contributions of Deumier, Moizard, Boutonnet, Géniaut, Dion, Boffa, Mazuyer, Dezallal… in Thibierge et alii, *La force normative, naissance d'un concept*, Paris/Bruxelles, LGDJ/Bruylant, 2009.

behaviors and to produce certain legal effects. The French Council of State has specified the cumulative conditions required for an efficient use of these instruments. They must "modify or guide the behavior of their addressees by prompting, as far as possible, their adherence; they mustn't directly create rights or obligations for their addressees; they present, by their content and elaboration, a degree of formalization and structuring that resembles law."[24] Thus, they do not create rights and obligations for their addressees, they aren't directly sanctioned[25] but their application is controlled and monitored. According to Mustapha Mekki, "[soft law] invites more than it constrains, proposes more than imposes, directs more than forces."[26] Its normativity is thus broader and lighter than prohibiting or authorizing by resorting to sanction and constraint. In other words, its obligatory and constraining effects are mitigated, but its authority relies as much on those who enunciate it as on its addressees' receipt.[27]

11. **A dichotomous vision that is ultimately misleading.** These conceptions have in common that they oppose soft law to hard law. This postulates a theoretical and uniform representation[28] of hard law's normative density[29], which doesn't represent reality.[30] To judge its effectiveness and legitimacy we will need to analyze a case, namely CSR applied by French law to social law. Before doing so, we need to clarify the expectations raised by the notions of effectiveness and legitimacy.

2. Analysis of soft law in terms of legitimacy and effectiveness

12. **Notions of legitimacy.** Philosophically, legitimacy aims at what is fair[31], which includes values and behaviors that are acceptable to and for all. Formally, legitimacy presumes that the norm has legal grounds because of its inclusion in a hierarchical legal order related to its author and respecting the democratic principles of enactment[32]. The term is therefore close to the notion of legality. Because it is based on the voluntary adherence of its recipients, its legitimacy depends on the involvement of the actors concerned in its elaboration.[33] Materially, soft law profits thus from a presumption of legitimacy by associating

[24] Conseil d'État, *Le droit souple*, Rapport public annuel 2013, la Documentation française, p.9.
[25] Thibierge, *Synthèse*, in Thibierge et alii, *La force normative, naissance d'un concept*, Paris/Bruxelles, LGDJ/Bruylant, 2009, p.785.
[26] Mekki, *Propos introductifs sur le droit souple*, in : Association Henri Capitant, *Le droit souple, Journées Nationales* t.XIII, Paris, Dalloz, 2009, p.11.
[27] Fercot, *Soft law, droits de l'homme et effectivité* in Ailincai (dir.) *Soft law et droits fondamentaux : actes du colloque CRJ du 4 et 5 février 2016, Paris*, A Pedone 2017, p.60.
[28] M. Mekki analyzes this conception as reductive because of the plurality of legal sources, and indefensible because of the gradation of law, cf. Mekki, *Propos introductifs sur le droit souple,* in: Association Henri Capitant, *Le droit souple Journées Nationales* t. XIII, Paris, Dalloz, 2009, p.4.
[29] By density we mean the degree of precision, but also of adaptability and the correlative power of interpretation in the implementation, cf. *(Re)faire la loi, Traité de légistique à l'ère du droit souple*, Bern, Stämpfli Editions, pp.539, 550–553.
[30] Thibierge, *Postface : puissances de la norme et densification normative*, in : Le Goff (éd.), *Puissances de la norme. Défis juridiques et managériaux des systèmes normatifs contemporains,* EMS Editions, *Caen,* 2017, p.195-208. Flückiger, *(Re)faire la loi, (op.cit.)* p.387, et.550ss.
[31] Goyard-Fabre, *Légitimité*, in : Alland/Rials, *Dictionnaire de la culture juridique*, Paris, Lamy PUF, 2003, p.926-933.
[32] Dournaux, *La garantie normative, garantie de la fonction normative*, in Thibierge et alii, *La garantie normative, exploration d'une notion -fonction*, Paris, Mare & Martin, 2021, p.61-62.
[33] Conseil d'État, *Le droit souple, Rapport public annuel 2013*, Paris, la Documentation française.

its addressees to its elaboration.[34] It favors communication between its authors, its addressees, and the individuals it will protect. However, the elaboration process must avoid giving way to the intervention of lobby groups, because the general interest would yield to categorical interests.[35] Regarding legitimacy, soft law must not allow public actors to circumvent the parliamentary discussions. The French Council of State also mentions that it must not involve uncertainty as to its effects or lead to excessive consequences for third parties.

13. **Notions of effectiveness.** To be useful, soft law must be effective. Studying an object through the prism of its effectiveness means to analyze, if it correctly encompasses the facts, and to assess its impacts. Legally, "effectiveness" must be distinguished from "efficiency", which includes a utilitarian dimension. Both notions tend to measure the effects, but whereas "effectiveness" aims at the reality of the effect, "efficiency" postulates a link of adequacy between the objective sought, i.e., the expectations, and the result obtained i.e., the effects. "Effectiveness" assesses the way the authorities who receive the text apply and interpret it.[36] Some authors also give the term a societal dimension that goes beyond its purely normative value. They consider how the recipients receive and apply the norms.[37] Analyzing a norm in terms of its effectiveness means not only studying the mechanisms that allow its concrete realization, but also grasping the relations between law and society to measure its effects.[38] It means going to the heart of the norm to measure it how well it guides the behavior of its addressees. Effectiveness is even more crucial for soft law because only the effects generated by these instruments let them attain the status of a normative instrument. So, it is important to ensure that soft law is not just a marketing or a window-dressing tool to ease one's conscience, or a means for circumventing a too demanding hard law and destabilizing an entire system.[39] In terms of effectiveness soft law is often presented more as an obstacle than as an asset. The scholarship criticizes, first, the fragmentation of its sources or its lack of precision, which leads to legal insecurity, and second, the weakness of its binding effects. They point it as responsible for degrading the quality of law, and for bypassing the public and democratic institutions that legitimate the law.[40] For other authors, however, it is a means of filling the gaps in hard law and an answer to a legal system in perpetual mutation. According to Céline Fercot, soft law is a vector of effectiveness that amplifies hard law for three reasons. First, it has an accompanying function. It can detail or complement an imprecise law.[41] It is then clearer, more accessible, and more intelligible, albeit less predictable. It can set the first rules in response to new or urgent needs in a rapidly evolving field. In this

[34] Mardon, *Soft law, droits fondamentaux et légitimité*, in : Ailincai (dir.) *Soft law et droits fondamentaux : actes du colloque CRJ du 4 et 5 février 2016*, Paris, A Pedone 2017, p.129-147.
[35] Mekki, *Propos introductifs sur le droit souple*, in : Association Henri Capitant, *Le droit souple Journées Nationales* t. XIII, Paris, Dalloz, 2009, p.22.
[36] Fercot, *Soft law, droits de l'homme et effectivité* in Ailincai (dir.) Soft law et droits fondamentaux : actes du colloque CRJ du 4 et 5 février 2016, Paris, A Pedone 2017, p.55-61.
[37] Commaille, *Effectivité*, in : Alland/Rials (dir.), *Dictionnaire de la culture juridique*, Paris, PUF, 2003, p.583-585.
[38] Baranes/Frison-Roche, *Le soucis de l'effectivité du droit*, Recueil Dalloz, 1996, p.301ss quoted by Fercot, *Soft law, droits de l'homme et effectivité*, in M. Anca Allinciai (dir.) Soft lwa et droits fondamentaux, A Pédone, 2017, p.32.
[39] *Propos introductifs sur le droit souple*, in : Association Henri Capitant, *Le droit souple Journées Nationales* t.XIII, Paris, Dalloz, 2009, p.22.
[40] Ailincai, *Soft law et droits fondamentaux, actes du colloque du 4 et 5 February 2016*, Paris, A. Pedone, 2017, p.19.
[41] For example, in health law.

case, it supplements a still gestating hard law. Second, it fulfills a function of evaluation: here it intervenes in parallel with the hard law to measure the effects of the latest.[42] Third, when hard law does not yet exist, soft law has an experimentation function that allows testing potential legal mechanisms; it can then constitute an autonomous vector of law.[43] It thus prepares the recourse to hard law, accompanies its implementation, or offers a permanent alternative; it is the ideal tool for apprehending new economic realities. Finally, according to the French Council of State, to reach the objective of effectiveness soft law must be likely to generate a sanction, or a decision with unfavorable consequences. So it's important that hard law control mechanisms accompany soft law, to detect breaches and apply sanctions.

14. **A vector for the promotion of law drawn by moral meaning.** According to the OECD, 68% of company codes contain a commitment to respect the law[44]. This legal appearance has an educational function, it's a vector of knowledge dissemination.[45] Another motive of companies that adopt CSR measures is to limit the legal risk induced by their activities. So, it's possible to say that CSR instruments produce legal effects and go beyond mere compliance with the law.[46] However when lawyers look at CSR, they must first discard the legal meaning attributed to the terms. Understanding the notion of CSR requires an analysis of the term "responsibility." While in French the word "*responsabilité"* has a double moral and legal value, in English only the term "liability" has a legal meaning and the effect to hold accountable somebody. Social responsibility must therefore be understood morally.[47] For example, while a code is in principle a legislative instrument and has a very high degree of normativity. However, when established by private actors it refers to "a formal statement of the values and business practices of a company and sometimes its suppliers." So a code of conduct must be regarded as a statement but also as a pledge by the company to observe them and to require its contractors, subcontractors, suppliers and licensees to observe them. It may be a sophisticated document, which requires compliance with articulated standards and has a complicated enforcement mechanism.[48] This moral implication also promotes the rights it contains.

15. **Overview.** The soft law is not legally binding, but rather constitutes a reference or model for its addressee. Because it contains a permissive effect, soft law indirectly validates the behavior of its addressee. This allows us to classify it in the law field and not in sociology or politics[49]. The legal norm, because of its general and abstract dimension, and because of its imperative character within a

42 For example, the establishment of an Independent Oversight Advisory Committee by the ILO.
43 Fercot, *Soft law, droits de l'homme et effectivité* in Ailincai (dir.) *Soft law et droits fondamentaux : actes du colloque CRJ du 4 et 5 février 2016*, Paris, A Pedone 2017, p.62-67.
44 Codes of Corporate Conduct: Expanded review of their contents, OECD Working Papers on International Investment, 2001/06, OECD Publishing. https://www.oecd.org/daf/inv/investment-policy/WP-2001_6.pdf
45 Mazuyer, *Les relations entre soft law et drois fondamentaux : une approche pragmatique de la RSE*, in Ailincai (dir.) *Soft law et droits fondamentaux : actes du colloque CRJ du 4 et 5 février 2016*, Paris, A Pedone 2017, p.270-271.
46 Mazuyer, *Les relations entre soft law et drois fondamentaux : une approche pragmatique de la RSE*, in Ailincai (dir.) *Soft law et droits fondamentaux : actes du colloque CRJ du 4 et 5 février 2016*, Paris, A Pedone 2017, p.269.
47 Mazuyer, *La garantie normative en matière de soft law : les particularismes de la RSE*, in : Thibierge et alii, *La garantie normative, exploration d'une notion -fonction*, Paris, Mare & Martin, 2021, p.104.
48 Green paper—Promoting a European framework for corporate social responsibility. COM/2001/0366 final.
49 Flückiger, *(Re)faire la loi, (op.cit.)* p.275.

hierarchical framework, aims at transforming the world, in its diversity of facts, to ensure its conformity with predefined values.[50] Soft law, in comparison, enables to guide behaviors although it is not mandatory. In their approach, legislators, aware of the objective assigned to them, must analyze the various normative instruments available and choose the most appropriate.[51] This is why governments have introduced cooperative instruments with a greater or lesser degree of normativity depending on the case. But bringing those instruments into the fold of the law does not necessarily mean acknowledging their legal character.

B. Towards hardening mechanisms in the implementation of the soft law

16. Over the past decade, governments have added hardening elements to soft law with the creation of compliance instruments on the one hand (2) and extraterritoriality instruments on the other (3). This trend is particularly noticeable in two areas that concern us specifically: CSR (1) and data protection (3).

1. The normative shift of soft law in the context of CSR

17. **Definition of CSR.** An emblem of the soft law[52], CSR is a way for enterprises to consider the impact of their operations on society and state their principles and values both in their internal methods or processes and with their partners. CSR is a voluntary, enterprise-driven initiative and refers to activities that go beyond mere legal compliance.[53] In practice, the scope of CSR reflets on three topics, which are ethics, the environment and human rights, including social rights, also called the “three pillars of sustainable development”.[54] These practices take shape through different media in a gradual normative scale: ethical charters or codes of conduct, letters of commitment, and even adherence to instruments like the Global Compact.[55]

18. **Juridification process.** One of the most interesting aspect lies in the juridification process of CSR, i.e., their implementation by means of contractualization. Indeed, by using contractual clauses, companies can go beyond the territorial application of norms and impose their application on their partners. Soft law is then transformed into legally binding agreement[56]. Using the contractual power in its favor the company invests and promotes a law whose contours have been freely and voluntarily set out. In the end, it is important to distinguish general commitments with no real effect, whose functions are mainly

[50] Supiot, *Critique du droit du travail*, PUF, 2015, p.XIXss. and p.186.
[51] Groulier, *La garantie normative au prisme de la légistique*, in Thibierge et alii, *La garantie normative, exploration d’une notion -fonction*, Paris, Mare & Martin, 2021, p.96-99. Flückiger, (Re)faire la loi, *(op.cit.)* p.241-252.
[52] Mazuyer, *La garantie normative en matière de soft law: les particularisme de la RSE*, in : Thibierge et alii, *La garantie normative, exploration d’une notion -fonction*, Paris, Mare & Martin, 2021, p.103-119.
[53] ILO, *Infocus intitiative on CSR : strategic orientation*, 295th session, Geneva, 2006 GB.295/MNE/2/1. https://www.ilo.org/public/english/standards/relm/gb/docs/gb295/pdf/mne-2-1.pdf
[54] https://www.greenmaterials.fr/environnement-social-et-economique-les-3-piliers-du-developpement-durable/
[55] https://www.unglobalcompact.org/what-is-gc/participants.
[56] Mazuyer, *Les relations entre soft law et drois fondamentaux : une approche pragmatique de la RSE*, in Ailincai (dir.) *Soft law et droits fondamentaux : actes du colloque CRJ du 4 et 5 février 2016*, Paris, A Pedone 2017, p.273-274.

communicative, and instruments containing real prescriptions for the company's partners (employees, suppliers, subcontractors)[57].

19. **The normative shift of CSR.** Originally an alternative standard to private and soft law, CSR has become the subject of a normative shift. For example, the European Union (EU) Commission had first defined CSR "[a]s a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders [internal and external] on a *voluntary* basis."[58] In 2011, the Commission removed the word "voluntary" to the definition and added that the "respect for applicable legislation, and for collective agreements between social partners, is a prerequisite for meeting that responsibility." It also added the necessity for the said companies to implement a "process to integrate social, environmental, ethical, human rights and consumer concerns into [their] business operations and core strategy in close collaboration with their stakeholders."[59] The ISO 26000 standard indicates: "social responsibility is the responsibility of an organization for the impacts of its decisions and activities on society and the environment through transparent and ethical behavior that (…) is *in compliance with applicable law* and consistent with international norms of behavior."[60] While soft law remains primarily voluntary by its nature, it now opens up on regulatory measures with a binding legal effect.[61] The initial objective of minimizing legal constraints hence has led to mandatory compliance standards.[62]

2. Compliance as a mechanism for the effectiveness of CSR

20. **Concept of compliance.** Compliance consists of all the measures and procedures that an entity must implement to ensure that its managers and employees respect all applicable legal and ethical standards. It forces companies to communicate on the application they make of a code of good conduct in the field of corporate governance. It obliges them to justify any deviation.[63] In other words, it delegates control to companies through a process of internalization.[64] Thus, companies carry out a self-assessment of the risks present in their business models and prioritize them in their strategy or in their extra-financial reporting. Consequently, they must implement measures and procedures to avoid or reduce these risks. Compliance implements private rules that are internal or external to the company. It implies that the administrative authority imposes its

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[57] Mazuyer, *Les relations entre soft law et drois fondamentaux : une approche pragmatique de la RSE*, in Ailincai (dir.) *Soft law et droits fondamentaux : actes du colloque CRJ du 4 et 5 février 2016*, Paris, A Pedone 2017, p.197-218.
[58] Commission of the European Communities, *Green Paper Promoting a European framework for Corporate Social Responsibility*, 18 July 2001, § 20, COM(2001)366.
[59] 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,* COM(2011) 681 final, p. 6.
[60] www.iso.org/iso-26000-social-responsibility.html.
[61] Mazuyer, *La garantie normative en matière de soft law : les particularisme de la RSE*, in : Thibierge et alii, *La garantie normative, exploration d'une notion -fonction*, Paris, Mare & Martin, 2021, p.105.
[62] Thibout, *La régulation, enjeu majeur de l'ordre public économique : l'exemple des démarches de Responsabilité sociale des entreprises des pouvoirs privés économiques*, Revue internationale de droit économique, 2019/1, t.XXXIII, p.63-74.
[63] Fasterling/Duhamel, Le comply or explain : la transparence conformiste en droit des sociétés, Revue internationale de droit économique,2009/2 t. XXIII, 2, pages 129 à 157.
[64] Flückiger, *(Re)faire la loi, (op.cit.)* p.374.

implementation.[65] Initially used in the fight against corruption, then in data protection, compliance is now developing in social responsibility.[66] Rating agencies in their evaluation or investors in their identification of socially responsible investments (SRI) take these elements into account by adding a section on corporate governance, assessing the CSR strategy's sustainability of the companies. Their requirements are summarized in the acronym “ESG”: environment, social and governance.[67] Compliance has become strategically important for companies due to the proliferation of foreign regulations with extraterritorial scope and the sanctions they carry.

21. **CSR and compliance.** The Rana Plaza tragedy in Bangladesh on 24 April 2013 triggered a global reaction.[68] Frameworks and guides published by international organizations in consideration of social, environmental, and societal issues by companies already existed.[69] However, public opinion demanded that multinational companies fully assume their responsibilities in the globalized economy to prevent such a tragedy from happening again. In France, after encountering many pitfalls, the law on the duty of care of parent companies and ordering companies carried by NGOs, trade unions and elected officials was adopted in 2017.[70] Its principle is to prevent serious violations of human rights and to promote fundamental freedoms, people’s health and safety and the environment. Thus, it holds groups responsible, not only for their activity, but also for the “activities of subcontractors or suppliers with whom an established business relationship is maintained.”[71] Another example is the PACTE law voted in May 2019[72] introduced similar obligations for companies to consider social and environmental issues of their activity in their management objectives.[73] Other follow-up measures could also be mentioned.[74]

22. **The use of compliance in European Union law.** At the European level, a similar duty of care exists through the so-called Non-Financial Reporting Directive

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[65] Flückiger, *(Re)faire la loi, (op.cit.)* p.374.
[66] Flückiger, *(Re)faire la loi, (op.cit.)* p.375.
[67] *L'investissement socialement responsable*, economie.gouv.fr
[68] The Rana Plaza building collapsed on April 24, 2013, in Dhaka, Bangladesh, causing more than one thousand one hundred deaths and two thousand injuries. The garment factories installed in this building were often indirect subcontractors of major international brands. The Accord on Fire and Building Safety in Bangladesh renewed in 2018 was signed between brands and unions to promote worker safety.
[69] For example, the OECD Guidelines for Multinational Enterprises, the UN Guiding Principles on Business and Human Rights (UNGPs) or the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy.
[70] Loi n°2017-399 from 27 March 2017. No less than three readings in the National Assembly and the Senate and the referral to the Constitutional Council were necessary to give rise to the final text. It was criticized for its imprecision, the associated legal risks and its probable lack of effectiveness, in the face of the standards already voluntarily applied by companies in the framework of the “soft law” emanating from the United Nations Human Rights Council, ILO and the OECD. Initially, an optional decree was to define the content of the obligations contained in the Vigilance Plan, a civil fine up to 10 million euros was removed by the Constitutional Council. https://www.conseil-constitutionnel.fr/decision/2017/2017750DC.htm Decision No. 2017-750 DC on March 23, 2017.
[71] Cf. art. L.225-102-4 of the code of commerce.
[72] LOI n°2019-486 from 22 May 2019 on the growth and transformation of enterprises, Art. 169 amending art. 1833 of the Civil Code.
[73] Duthilleul/Jouvenel, *Evaluation de la mise en œuvre de la loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre*, January 2020.
[74] E. Mazuyer mentions in particular law n°2008-649 of July 3, 2008, on corporate governance, law n°2010-788 of July 12, 2010, on the national commitment to the environment, law n°2016-1691 of December 9, 2016, called the Sapin II law, cf. Mazuyer, *La garantie normative en matière de soft law : les particularismes de la RSE*, in : Thibierge et alii, *La garantie normative, exploration d’une notion -fonction*, Paris, Mare & Martin, 2021, p.114-117.

adopted in 2014.[75] The idea is to bring the financial sector to play an important role in achieving sustainability goals. The EU has taken several measures to ensure that the financial sector plays a significant part in achieving the objectives of the European Green Deal. This, and "An Economy That Works for People," are part of European Commission's six strategic objectives for 2019–2024 through which the EU intends to strengthen the social market economy, helping to build an economy that serves citizens and brings stability, jobs, growth and investment.[76] A directive has introduced the obligation for companies[77] to publish the impact of sustainability issues on their results, situation and evolution (the "outside-in" perspective); and the impact of their activities on the population and the environment (the "inside-out" perspective).[78] This directive is based on the idea that only EU action can guarantee the comparability of non-financial information published in the single market and the consistency of reporting requirements. The European Parliament is currently adopting a revision of this directive to guarantee more precision and uniformity in the information.[79]

23. **Overview: reconstitution of the transnational enterprise's "de facto" unity.** These texts are examples of conformity expectations programs' implementation through compliance. Through incorporation of material soft law into hard law and the takeover of the compliance's self-regulatory process, the law opens the way to co-regulation, i.e., self-regulation controlled by the state. By this means, legislation becomes cooperative.[80] France and Europe have reinforced the principle contained in the soft law by giving them the "force of law", and extended them in all the countries where the largest groups have subsidiaries and subcontractors. These laws have an effect on an "extended" perimeter of the company even including their clients to overcome the territorial compartmentalization of responsibilities due to the outsourcing or international splitting of their activities and achieve real efficiency. The law has thus reconstituted the "*de facto*" unity between parent companies, subsidiaries, ordering companies and their partners and subcontractors.[81] This facilitates legal recourse and sanctions, which raises the question of the law's multi-territorial application.[82] However, their evaluations have shown that precise guidelines must be implemented to strengthen their enforcement.[83] The European authorities have also taken a similar approach in data protection, which concerns foremost the platforms due to the dematerialization of the connection with the foreign country.

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[75] Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups.
[76] https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en.
[77] This concerns companies that are "public interest entities," i.e., listed companies, banks and insurance companies, and have on average more than 500 employees and public interest entities that are parent companies of a large group and have on average more than 500 employees on a consolidated basis, approximately 11,700 companies.
[78] The so-called double materiality.
[79] Proposals for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards corporate sustainability reporting.
[80] Flückiger, *(Re)faire la loi, (op.cit.)*, p.353ss.
[81] https://www.economie.gouv.fr/files/files/directions_services/cge/devoirs-vigilances-entreprises.pdf.
[82] Duthilleul/Jouvenel, *Evaluation de la mise en œuvre de la loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*, January 2020.
[83] Duthilleul/Jouvenel, *Evaluation de la mise en œuvre de la loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*, January 2020.

24. **Intermediate conclusion.** To conclude this section, we will translate Carbonnier's words. "[T]he law is a scum on the surface of society"; "the visible part of an iceberg symbolizing the whole of social relations"; "it does not stand alone but coexists with other systems of norms through a phenomenon of withdrawal."[84] Thus, soft law has developed in areas where the State doesn't wish to or can't keep exclusively within its fold in a well-balanced entanglement. The result of this coexistence is the implementation of preventive interactive devices that go further than legal guarantees.[85] In other words, in a complementary relationship soft law defines the obligations and hard law sets the implementation mechanism.[86] The object of the study that follows is assess the use of CSR, through the French example, not in human social rights, but in social security.

III. Application of soft law to social security: cross analysis with the French CSR

25. Considering the liberal prism specific to platforms, this section will cross-analyze the normative instrument of soft law with the objective of social security that governments seek to achieve. The main question here is the effectiveness and legitimacy of the transfer of responsibility to private companies through CSR. We will assess the instrument's adequacy to the social protection's objective assigned to States. As in the previous section we will focus on the instrument itself, not the content of social protection. However, we'll see that, although the content of the law isn't the object of our study, it affects indirectly the assessment so we can't totally rule it out. First, we will describe the French CSR system set up to supplement the social security coverage of platform workers (A); then, using the herein above developed concepts, we will analyze the ability of CSR to achieve the goal of social protection (B).

A. CSR as a basis for social protection commitments: a two-tier system

26. At a time when no regulations were yet in place in other European countries[87], the French government relied on the principle of platforms' social responsibility to grant certain rights to self-employed workers. These rights are integrated into the French Labor Code (CTr) in the Part VII dedicated to specific professions and activities. Unlike these professions, which are presumed to fall under the scope of labor law (artists, journalists, domestic workers, traveling salespeople…);[88] workers using platforms, on the contrary are presumed being independent. There are two categories of dispositions. First, we will present, the general principles of social responsibility applicable to all independent workers who use one or more electronic platform of intermediation to carry out their professional activities (1). Second, we will sketch out the specific dispositions of self-regulation for platforms

[84] Carbonnier, *Flexible droit : Pour une sociologie du droit sans rigueur*, Paris, LGDJ, 10è ed. 2001, p.24-27.
[85] Chevallier, *Avant-propos*, in Thibierge et alii : *La garantie normative, exploration d'une notion -fonction*, Paris, Mare & Martin, 2021, p.15-21.
[86] Mazuyer, *La garantie normative en matière de soft law : les particularisme de la RSE*, in : Thibierge et alii, *La garantie normative, exploration d'une notion -fonction*, Paris, Mare & Martin, 2021, p.115.
[87] Daugareilh, *The legal status of platform workers in France*, Comparative Labor Law & Policy Journal, vol. 41, n°2, p. 405.
[88] Cf. Titles 1 to 3 art. L7311-1 to L7332-7 CTr.

acting in transport with a driver or delivering goods by means of a two or three-wheeled vehicle, whether motorized or not (hereafter “transport platforms”) (2).

1. The general principle of the platforms' social responsibility

27. **Presentation of the French platforms’ social responsibility regime.** Since January 1, 2018, the law introduced a social responsibility for "electronic platforms of intermediation which determine the characteristics of the service and set its price" (L7342-1 CTr).[89] This responsibility provides that the platform reimburses the voluntarily subscribed occupational accident insurance premium to the self-employed worker who uses the platform’s intermediation services or provides a private accident insurance (L7341-1 and L7242-2 CTr). This provision applies only if the worker achieves with this platform a minimum turnover of 13% of the annual Social Security ceiling (approximately €5,348 p.a.) (L7342-4 CTr). The platform must also bear the costs for loss of income related to continuing professional training (L7342-3 CTr). Self-employed workers have the right to organize coordinated refusal to provide their services (L7342-5 CTr). They can form trade union organizations, join them, and assert their collective interests through them (L7342-6 CTr). The ordinance of April 21, 2021 defines these collective rights [90] (L7343-1 to 20 CTr).

28. **A surprising cocktail of rights.** These common provisions form a surprising arrangement of three seemingly unrelated elements: work accident insurance, training and studying compensation and trade union representation, from which a coherent protection of digital platforms’ workers is expected. The protection focuses the period of activity and set aside unemployment or retirement. To justify this regime, the law postulates independent work relationships. Then the law provides several collective labor rights which are rather typical of dependent work relationships: the possibility of concerted refusal movements to provide services (strike); the right to form a trade union; the institution of a social dialogue in each branch of activity. Finally, they establish the principle of a voluntary or a private insurance for work accidents: either organized and paid voluntarily in advance by the worker, or directly negotiated by the platform. But the platform’s participation is reserved for workers who make a minimum turnover with the same platform, a threshold which is rather surprising considering social protection's need increases with the precariousness of a person.

2. Provisions for the transport platforms sector

29. **Social charters in France.** The term charter refers to “a document with a symbolic dimension”[91] or "an act that brings together major principles, standards

[89] Art. 60 of the Loi n°2016-1088 from 8 August 2016 on labor, the modernization of social dialogue and the securing of career paths *[loi relative au travail, à la modernisation du dialogue social et à la sécurisation des parcours professionnels*].
[90] Ordonnance n°2021-484 from 21 April 2021 [Ordonnance relative aux modalités de représentation des travailleurs indépendants recourant pour leur activité aux plateformes et aux conditions d'exercice de cette représentation]. A ratification bill must be proposed in Parliament within three months of the publication of the said ordinance (art. 48 LOM).
[91] Mazuyer, *Les relations entre soft law et drois fondamentaux : une approche pragmatique de la RSE*, in Ailincai (dir.) *Soft law et droits fondamentaux : actes du colloque CRJ du 4 et 5 février 2016*, Paris, A Pedone 2017, p.270-271.

or ideals (…) in an appearance of legal rules."[92] France encourages self-regulation through charters or sometimes even imposes them when no collective labor agreements exist. This way, the legislator delegates to the employer the handling of situations concerning the companies' functioning, instead of implementing suppletive legal provisions.[93] This choice proceeds from a bottom-up approach of the normative hierarchy, through a contractual instrument.

30. **Social charters as special provisions to transport platforms.** Since October 23, 2020, the Mobility Orientation Act (LOM)[94] has specified the content of this social responsibility. Without going into details, these platforms can sign a charter in which they commit to improving the working conditions of their self-employed workers after a prior consultation procedure. Then platforms can apply for an administrative certification (by the executive power) of their charter (L7342-9 and 10 CTr).[95] In return of the improvement of working conditions the law intended to protect irrevocably platforms against a reclassification of the contract as an employee relationship. But the French Constitutional Council judged this provision contrary to article 34 of the Constitution, which assigns to the legislator (not the executive power) the task to determine the principles of labor law, trade union law and social security.[96]

31. **An act of ambivalent nature.** This soft law procedure, which is not very demanding on companies, introduces into the Labor Code a self-regulation principle of relations with workers.[97] The law defines the rights and obligations of the parties and lists the measures platforms can adopt by a recommendation statement. So, the charter is an act of ambivalent nature: unilateral, optional, and discretionary, but producing collective effects. Unilateral in its content the charter is not the result of a collective bargaining. So, albeit a consultation process, it is far from having the strength of a collective labor agreement. The charter is optional and discretionary in its adoption but produces mandatory effects for all workers by automatic inclusion in the general terms and conditions of use. The initial objective of the government was to obtain a voluntary commitment from the platform in favor of workers. In return the government planned to grant a protection against the risk of judicial requalification. This protection would result from the certification of the charter, but as we saw above, this couldn't happen.

32. **The introduction of additional protective provisions.** Independently from any charter and social responsibility, the LOM[98] complements the conditions of employment of transport platform workers set in the Transport Code (CT). So, a

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[92] Le Tourneau, *L'éthique des affaires et du management au XXIè siècle*, Paris, Dalloz, 2000, p.70. quoted by Mazuyer *Les relations entre soft law et droits fondamentaux : une approche pragmatique de la RSE*, in Ailincai (dir.) *Soft law et droits fondamentaux : actes du colloque CRJ du 4 et 5 février 2016*, Paris, A Pedone 2017, p.270.

[93] Loiseau, *Travailleurs des plateformes : un naufrage législatif*, Semaine juridique édition sociale 14 January 2020, p. 3 mentioning the charter on deconnection (loi n°2016-1088 from 8 August 2016) and the charter on telework (ordonnance n°2017-1387 from 22 September 2017).

[94] Cf. art. 44 and 35 of Loi n°2019-1428 from 24 December 2019 [*loi d'orientation des mobilités*] completed by a decree n°2020-1284 from 22 October 2020 [*décret relatif aux modalités d'application de la responsabilité sociale des plateformes de mise en relation par voie électronique*].

[95] The implementation provisions of the charter have not yet been put into practice.

[96] Decision of the Constitutional Council n°2019-794 DC, 20 December 2019.

[97] Loiseau, *(op. cit.)*, p.5.

[98] Cf. art. 44 of the LOM.

complement of hard law has been introduced to increase transparency of commercial conditions and protect workers. Before each service acceptance, the drivers must be informed of the distance of each ride and the minimum price guaranteed, they can refuse the service without any penalty or breach of contract (L1326-2 CT). Moreover, the platform must publish indicators relating to the duration and the average income generated by the workers' activities (L1326-6 CT). Finally, workers can choose their working hours, periods of inactivity and disconnect during working periods without breach of contract (L1326-4 CT).

33. **Overview.** This new system results in a social protection model whose innovation lies both in its form and in its content. In so doing, the legislator has granted to the charter, at least in appearance, the three main forms of normative guarantee: a contractual value by integration into the general conditions; justiciability because it will be the bearer of legal effects; a consecration by state law by homologation.[99]

B. Suitability of CSR to achieve the goal of social protection

34. Now that we have presented the method, we will evaluate its effectiveness in achieving the aim assigned to the legislator by article 34 of the French Constitution.[100] To this effect, we will use the conditions of effectiveness set by the French Council of State for the social charters[101] (1); then we will evaluate the effectiveness and legitimacy of the charter (2).

1. Effectiveness and legitimacy of the platforms' social charters

35. **The abandonment of homologation—the missed goal of the Constitutional Council's decision.** Hard law control mechanisms must accompany soft law to guarantee effectiveness.[102] This control can be *a priori* or *a posteriori*. The *a priori* control results from the successful certification by the administrative authority. However, the purpose of this certification was not so much to increase the guarantee in terms of social security as to provide immunity for the platform, to avoid the existence of a legal relationship of subordination with the workers. Indeed, the required commitments in the charter are very close to those typical of labor law, so it could increase such a risk. By this approach the legislator not only postulates the setting aside of labor law[103], but also implicitly confirms the existence of labor law as a social risk for platforms. The Constitutional Council canceled this part of the legislation, thus depriving the charter from the absolute guarantee of a non-requalification.[104] Hence the platform will limit its commitments the charter to a "communication tool formulating declarations of

[99] Mazuyer, *La garantie normative en matière de soft law : les particularisme de la RSE*, in : Thibierge et alii, *La garantie normative, exploration d'une notion -fonction*, Paris, Mare & Martin, 2021, p.107-112.
[100] Art. 34 of the French Constitution from 4 October 1958 provides that the law determines the fundamental principles of the labor law, trade union law and social security. Consequently, it is the responsibility of the legislator to fully exercise this competence and it cannot delegate it to administrative or jurisdictional authorities or to private persons without delay. Cf. Decision of the Constitutional Council n°2019-794 DC, 20 December 2019 § 23.
[101] Conseil d'État, *Le droit souple, Rapport public annuel 2013*, la Documentation française.
[102] Conseil d'État, *Le droit souple, Rapport public annuel 2013*, la Documentation française, p.111.
[103] Larrazet, *Régime des plateformes numériques, du non-salariat au projet de charte sociale*, Droit social, 2019, p.168.
[104] Decision of the Constitutional Council n°2019-794 DC, 20 December 2019 § 28.

intent."[105] One might think that the Constitutional Council's decision had the effect of paralyzing the government's intention to eliminate uncertainties about possible undesirable effects (making reclassification impossible). But actually, the absence of a binding effect on the platform resulting from the certification raises uncertainty about the real effects of the charter on workers. It is counterproductive in terms of protection.

36. **The threat of contract's requalification, a counterproductive sanction.** A sanction must be applicable to guarantee effectiveness. The sanction could result from an *a posteriori* control of the charter, but the law doesn't provide such a control (L7342-9 § 8 CTr i.f.). Therefore, the charter does not contain any direct sanction. An indirect sanction could arise in case of abuse of rights.[106] In this sense, it is possible to say that the charter can be sanctioned. And since the Constitutional Council removed the provision paralyzing the use of the charter in the requalification of the contract, a sanction is indeed likely to apply. Nevertheless, the requalification as a sanction would occur if the platform intervened "too much" in the contractual relationship, but not if it offered insufficient protection. Therefore, the threat of a sanction ultimately works in the opposite direction to its intended effect within the meaning of the French Council of State's criterion. It is also counterproductive in terms of protection. In seeking to grant guarantees to the platform, the legislator has mixed the subject and object of the rights resulting from the social responsibility approach. In the French case, the impossible attempt to avoid labor law has paralyzed the charter in its effectiveness and has transformed it into a threat for the company.

37. **The limited involvement of the actors concerned.** As for the legitimacy, it depends on the one hand, on the involvement of the actors concerned in the charter's elaboration; and, on the other hand, on the fact that the procedure neither avoid the rules governing the constitutional division of power, nor have excessive consequences for third parties. Regarding the actors concerned, the workers and the social partners aren't involved in the drafting of the charter, they are only consulted before its certification (L7342-9 and 10 CTr). The new articles of April 2021 indicate the wish to reinstate the trade unions' counter-power and to create a social dialogue. This criterion of legitimacy is therefore satisfied.[107] Nevertheless, the reference to the self-employed strongly lessens this counter-power. By initiating a form of collective bargaining, the French regime intended to bring together "workers' demands and company ethics".[108] But not propped by labor law collective bargaining is deprived of most of its power. Indeed, the status of self-employed offers little chance of development for collective bargaining because the EU law limits the scope of collective rights for independents. First, EU law has liberalized the information society services[109]. So, the decisions of

[105] Loiseau, *(op. cit.)* p.4-5.

[106] As soon as the norm confers subjective rights, the jurisprudence sanctions its deviant implementation by the theory of abuse of rights. The sanction of the violation of the norm is thus only indirect but allows the granted right to be exercised in accordance with its "social" function by stopping the unlawful, cf. Dournaux, *La garantie normative, garantie de la fonction normative*, in Thibierge et alii, *La garantie normative, exploration d'une notion—fonction*, Paris, Mare & Martin, 2021, p.68-69.

[107] This intent remains mitigated, as the chapter defining the "platform social dialogue" is still empty.

[108] Larrazet, (op. cit.) p.174.

[109] Restrictions on the freedom to provide services provided by electronic means, within the Union are in principle prohibited in respect of nationals of Member States established in a Member State other than that of the recipient. States may, however, provide for measures restricting the freedom to provide such services, provided that such

the CJEU limit the scope of regulation by the Member States to platforms that are not providing "an information society service." This is the case when they exercise a "decisive influence over the conditions under which services [are] provided."[110] Thus, the French government can only regulate platforms acting outside the information society services. This means that the scope of the law must limit to platforms that exercise a "decisive influence" over the service and has to regulate platforms by economic sectors.[111] Second, the EU competition law prohibits, in principle, tariff agreements between companies.[112] So the conclusion of collective agreements on the price of labor is prohibited unless it is concluded between social partners and contributes directly to the improvement of working conditions.[113] Self-employed workers being companies within the meaning of European Competition law, the social rights negotiated must thus be limited to working conditions, excluding minimum wages or tariff agreements.[114]

2. Effectiveness and legitimacy of the platforms' social responsibility

38. **The exclusion of labor law, a source of legal insecurity.** The French Council of State highlighted a risk of soft law in terms of legitimacy and legal certainty.[115] Regarding legal certainty, the law refers to the status of self-employed workers (L7341-1 CTr) as a vehicle for minimum guarantees, but the legislator did not establish a presumption of non-salaried status for the workers on digital platforms.[116] This reference to the self-employed status, which allows a very light social protection, aims at encouraging a promising economic sector.[117] This approach not only relegates protection to a very limited field and personal scope, but also overlaps with the general social security system, meanwhile cutting it off from any reference.[118] By creating new concepts, the new system "unravels" the existing social security and institutes a two-tier system thus increasing the risk of abuse. This system also seems to borrow concepts from labor law as a "model" while "disguising" any terminological reference in a process of avoiding labor

measures are necessary for reasons of public policy, public health, public security or consumer protection (cf. arts. 56 and 58§ 1 TFEU, Directive 2000/31 art.3§2–4, Directive 2015/1535).

[110] CJEU, case C-434/15, 20 December 2017 §39–40 (Asociación Profesional Elite Taxi vs. Uber Systems Spain SL), "Uber exercises decisive influence over the conditions under which that service is provided by those drivers. (…) That intermediation service must thus be regarded as forming an integral part of an overall service whose main component is a transport service and, accordingly, must be classified not as 'an information society service' (…)". See also CJEU case C-320/16, 10 April 2018 (Uber France SAS), and CJEU case C-390/18 19 December 2019 §68–69 (Airbnb Ireland UC) "[the court] do[es] not establish that Airbnb Ireland exercises such a decisive influence over the conditions for the provision of the accommodation services to which its intermediation service relates. (…). In the light of the foregoing, (…) an intermediation service (…) must be classified as an 'information society service (…)."

[111] For a detailed analyse see Magoga-Sabatier, *La qualification des relations de travail des plateformes numériques*, RDIA Revue de droit international d'Assas, vol.3, 2020, p.222-256 and Jusletter.ch, 1 March .2021.

[112] Art. 101§1 TFEU.

[113] CJEU, case C-67/96, 21 September 1999.

[114] CJEU, case C-413/13, 4 December 2014.

[115] Conseil d'État, *Le droit souple, Rapport public annuel 2013*, la Documentation française, p.116-129.

[116] Cour de Cassation, *Note explicative relative à l'arrêt n°1737 de la Chambre sociale du 28 novembre 2018 (17-20.079)*.

[117] For microentrepreneurs benefit from assimilation to the general social security system, protection in case of maternity and against loss of activity. Cf. *Rapport du HCFiPS sur la protection sociale des travailleurs indépendants,* 24september 2020, https://www.securite-sociale.fr/home/hcfips/zone-main-content/rapports-et-avis-du-hcfips/rapport--hcfips-sur-la-protectio.html.

[118] Loiseau, *(op. cit)* p.3.

law.[119] The resulting legal insecurity jeopardizes the effectiveness of the protection granted by the charter.

39. **The disruption of social insurance's general principles.** The privatization of the occupational accident insurance has disembodied the social protection from the public order. It introduces rules which in practice are contrary to equal treatment, solidarity, and universality of social security.[120] According to these principles, companies do not have a private responsibility towards their employees, the society, in which the companies participate, supports this responsibility. Privatization of social security switch the system to a risk and private insurance system. Without going into detail, as this would go beyond the scope of this article, it goes against the rules of financing social security, based on professional income and the employer's contribution. It removes any possibility for correcting social inequalities by transferring them from one social group to another.[121] It could even have the perverse effect to encourage platforms to maintain precariousness in relationships to benefit from threshold effects, i.e., encourage workers not to achieve a turnover exceeding 13% of the annual social security ceiling[122].

40. **Excessive consequences for third parties.** As for the consequences for third parties, i.e., workers and other companies, they are far from being insignificant. France has created a "tailor-made" legal regime based on social responsibility. This system is in direct competition with social law relegated to salaried employment.[123] It is in contradiction with the European Pillars of Social Rights and portability of social security rights, which link social protection to the activity and not to the employment's status.[124]

41. **Intermediate conclusion.** While the French effort is on many aspects praiseworthy, it also misunderstands the role of the legal instrument. Whether hard law or a soft law, the legal instrument must take stock of a societal problem; define the measures to solve it; identify the best-suited tools to reach them; and finally evaluate their adequacy, their effectiveness, and their positive and negative consequences.[125] The solution imagined in France aims to ensure confidence in a system that encourages economic activity but does not guarantee substantial social protection. Under the pretext of granting additional rights, the legislator refuses to give a definition of a status for platform workers.[126] In this way, we could say that they resign from their role by refusing to legislate and by transferring to companies their own social duties. In this sense, the French CSR system as a vector of protection is more a symptom of the legislative instrument's inability to solve a new problem than a pragmatic futuristic choice. Does this mean that States cannot delegate social security through CSR? In the concluding

[119] Decision of the Constitutional Council n°2019-794 DC, 20 December 2019 § 17.
[120] Daugareilh, *La Fausse inclusion des travailleurs des plateformes dans le système français de sécurité sociale*, p.7, unpublished yet.
[121] Larrazet, *(op. cit.)* p.169-171
[122] See above § 27.
[123] Daugareilh, *(op. cit.)*, p.83.
[124] Frouin, *Réguler les plateformes numériques de travail, Rapport au Premier Ministre* 1 December 2020, p.67, Daugareilh, *(op. cit.)*, p.17.
[125] Flückiger, (*Re)faire la loi, (op.cit.)* p.167 quoting OECD, *Building an Institutional Framework for Regulatory Impact Analysis (RIA): Guidance for Policymakers*, 2008, p. 16ss.
[126] Loiseau, *(op.cit.)*, p.3.

section that follows, we will propose the criteria that CSR could meet to become a vector of social protection that prepares society for future reforms.

IV. Concluding section

42. **Non-specificity of the employment relationship resulting from digital intermediation.** Depending on the point of view, the employment relationship resulting from digital intermediation can be seen either as a new paradigm or as an existing economic model taken to its extreme. The French system has opted for the first postulate: that of novelty. This postulate of a new paradigm has justified the application of a legal regime disconnected from labor law i.e.: self-employed status. In our view, however, the intermediation may take different contractual forms but is not a *sui generis* contract. Thus, the specificity is hard to demonstrate legally. Platforms, or the Internet, are not to be sectorized because they are the "world itself". When the French regime treats platforms as a specific form of work, it shows that it is influenced by pressure groups which is detrimental to the public interests. And as we have demonstrated above, most of the criticisms about the charter stem from the avoidance of labor law resulting from the self-employed status's choice. On the contrary if we consider that digital intermediation is only an economic model taken to its extreme, it is then possible to link it to social law, sometimes adding flexibility or appropriate protection.

43. **Labor law protection allows supervision of the transfer of social responsibility from the State to the company**. The French social charter implies a contractualization, and the privatization of legislative power. This extends the hold of private authority to the detriment of public authority. And this gives to the companies a responsibility without the authority to enforce it.[127] On the contrary, a link to labor law, even in an adapted version, allows including the relationship in the global and coherent universal system of social security. With such a prerequisite, the principles of social insurance would regulate the transfer of responsibility for social protection to companies. With such a prerequisite, the social responsibility embodied in charter would be the last stone brought to a system with solid foundations. As such, it would allow transcending the territoriality of labor law and consider the dematerialization of relations. Finally, as a complement to labor law, CSR allows including the social partners, thereby overcoming the isolation of workers, and creating a real balance of negotiation that guarantees the charter's legitimacy.

44. **Proposals for reconciling economic freedom and social law.** So, we have demonstrated that soft law can be an extremely effective instrument in an internationalized and liberalized context. Using the above arguments, we can say that CSR becomes effective and legitimate when it contains sanctions and respect the democratic process. It can transcend the territoriality of labor law. Even in the domain of State competencies like social security a certain delegation of competence to companies is possible thanks to the compliance mechanisms. On the contrary, privatization of social security would destabilize the whole system. So backed up by a system with solid foundations, CSR could become a pragmatic choice. Social responsibility could be the last stone brought to the edifice not its corner stone.

[127] Flückiger, *(Re)faire la loi, (op.cit.)* p.273, 329.