

Introduction under French Law of the duty of care for the parent and ordering parties

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Following a lengthy debate, a new principle of a duty of care for companies with respect to their subsidiaries, suppliers and subcontractors has been introduced into French law by the “law on duty of care for the parent and ordering companies”, published in the Official Journal on 28 March 2017.

This new act aims at making transnational companies more responsible “in order to prevent tragedies in France and abroad and to obtain damage-claims for victims in case of damages affecting human rights and the environment”.¹

This willingness to “regulate the globalisation”, according to the rapporteur Dominique Potier, followed a series of tragedies, and in particular the one of Rana Plaza in Bangladesh.

The draft act had obviously furthered to protests, particularly because of the potential damages to the French companies’ competitiveness, while many of them have already adopted codes of good practice or compliance plans.

Concretely, this law creates a duty for the relevant companies to effectively put in place a “plan of vigilance”, which non-compliance

may expose it to sanctions. It partially overlaps with the “Sapin II law” of 9 November 2016, which also enforces a duty to prepare a plan (of compliance in this case)².

The duty to set up a plan is applicable already in the current financial year. The rules relating to the publication of the plan reporting, as well as the sanctions in case of absence of plan, are applicable as of the report³ for the first financial year opened after the issuance of the law.

SCOPE

The new provisions apply to any company⁴ employing, at the closing of two consecutive financial years:

- at least five thousand employees within the company and in its direct or indirect subsidiaries which registered office is located in France;

² « Loi relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique » (Law related to transparency, fight against corruption, and modernization of economic life)

³ Annual report on the “state of participation of employees in the share capital” as mentioned under article L.225-102 of French Code of commerce

⁴ The relevant company forms are SA (“société anonyme”), as well as “sociétés en commandite par action” and “sociétés par actions simplifiées”.

¹ Law proposal n°2578, 11 February 2015, related to the vigilance duty for the parent and ordering parties

- or at least ten thousand employees within the company and in its direct or indirect subsidiaries which registered office is located in France or abroad⁵.

Nevertheless, even if the text only mentions big companies, small and medium sized companies will also be affected, if they are suppliers or subcontractors of big companies. Big companies will thus impose the measures they have themselves held as necessary. Furthermore, the plan of care will concern the activities of:

- the parent company;
- any company directly or indirectly controlled by the parent company⁶;
- the subcontractors and suppliers with whom an "established trade relation" is maintained⁷.

CONTENT OF THE PLAN

The plan shall include "appropriate measures of reasonable vigilance in order to identify risks et prevent serious breaches of human rights and fundamental liberties, health and security of people as well as environment in the various relevant entities".

It includes the following measures, partially already known by the Sapin II law, but going further:

- a cartography of the risks designed to their identification, their analysis and their hierarchization;
- procedures of regular assessment of the situation of the subsidiaries, subcontractors and suppliers with respect to the risks' cartography;

⁵ The text is not as to whether this obligation applies only to head of group companies having their seat in France, or also companies having their seat abroad. The commentaries to the new act appear to held that the first is the case.

⁶ As understood under French Code of commerce, article L233-16.

⁷ The extensive jurisprudence regarding the "breach of maintained trade relations" sanctioned by articles L.420-2 and L.442-6, I, 5° of the French Code of commerce shall be kept in this respect; it implies a durable and relatively strong relation, excluding any occasional contracting party.

- appropriate actions of risk mitigation and prevention of serious breaches;
- a mechanism of whistleblowing and collection of information related to the existence or the realization of risks, implemented with representative trade union organizations within the company;
- a follow-up mechanism for the measures taken and assessment of their efficiency.

The plan of care and the reporting on its effective implementation shall be disclosed in the annual report on the state of participation of employees in the share capital.

The plan aims at being elaborated with "stakeholders" of the company, as the case may be in the framework of multiparty initiatives within the branch or at a local scale. Although the "stakeholders" are not defined by the law, trade-unions, associations for defence of the various interests, as well as NGOs are included. The reference to the "multiparty initiatives" shall enable companies to refer to agreements which are more and more negotiated by certain branches.

SANCTIONS

A formal notice can be sent to the company failing to its duty to set a plan of care. If the company does not comply with it within 3 months from the formal notice, the relevant jurisdiction can, upon request from any person justifying of an interest to act, issue an injunction, as the case may be, under fine⁸. Unlike the Sapin II law, which attributes the power to issue an injunction to order the setting of a plan to the new French Anticorruption Agency, the law does not mention the relevant organism for the request of formal notice.

Furthermore, any person justifying of an interest to act can initiate an action for liability before the competent authority against the company. It may then have to repair the damages which may have been avoided if the

⁸ French Code of commerce, article L225-102-4, II, created by the law n° 2017-399, 27 March 2017, art. 1^{er}

company had complied with its obligations⁹. Nevertheless, it might be difficult to bring the proof of causality, between the failing of setting the plan, and an accident occurred in a third country.

The act initially contained the possibility to set a civil penalty of up to 10 million euros, and even 30 million in the event of a severe breach of fundamental rights. But taking into account the lack of clarity of the terms used by the legislator for describing the obligations, the French Constitutional court has censored the text instituting a fine¹⁰.

CONCLUSION :

This law is in line with the Sapin II law, by imposing to the companies of a certain size a duty to set up a plan of care. And if this reinforcement of the vigilance duty in the production chain is welcomed, the necessity of such a law at the national level is questionable. Moreover, the lack of coordination with the Sapin II law, its very vague terminology as well as its difficult application in details may be criticised.

Even if this law concerns only companies with a certain size, its indirect impact, through contractual clauses, on small and mid-sized companies is a reality. The latter will not have the same means as the big companies, which have generally already put in place similar procedures.

At the same time, companies generally take advantage from these procedures, by communicating positively on their good practices. By reinforcing them, the vigilance duty will be a new instrument of positive communication for companies.

⁹ French Code of commerce, article L. 225-102-5, created by the law n° 2017-399, 27 March 2017, art. 2

¹⁰ Decision n°2017-750 DC, 23 March 2017