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THE FRENCH CONSTITUTIONAL COURT PARTIALLY INVALIDATES THE CORPORATE DULY OF VIGILANCE LAW

Real Estate and Construction Environmental Law Public Law and Public Procurement Law | 24/03/17 | Vincent Brenot

In decision 2017-750 DC of March 23rd, 2017, the French Constitutional Court slammed several of the provisions of the law establishing a duty of vigilance (or "duty of care") for parent and subcontracting companies.

As specified in our previous newsletters[1][2], this law, which did not stem from a government initiative but from a private members' bill, aims at introducing, for French companies with more than 5,000 employees in France or 10,000 employees worldwide (subsidiaries included), a general duty to establish, publish and implement a vigilance plan. This plan has for its purpose to identify and prevent the risk of violations of human rights and fundamental freedoms arising out of the activities of the parent company, the companies under its control and their suppliers and subcontractors, both in France and abroad.

The law provides for a three-step mechanism available to any interested parties to ensure compliance by companies placed under this duty. The first step consists of a formal notice to comply sent to the company. If this formal notice is unsuccessful, the party having sent it can apply to the courts for an injunction.

Lastly, and herein resided the main weakness of the law identified by the Constitutional Court: the law provided that in case of noncompliance by a company, the courts could impose a civil fine on it of up to §10 million. The amount of this fine could be tripled if the company's breach of its duties caused harm.

In its decision, the Constitutional Court found to be consistent with the Constitution the duty created by the law to establish a vigilance plan, the formal notice mechanism, the court-ordered injunction in case of noncompliance and the possibility of the company's liability being incurred for breach of its duties under the vigilance plan.

The Constitutional Court nonetheless criticized the lawmakers for their inadequate definition of the obligations created by the law, and in particular (i) the vagueness of the language used, such as *"reasonable vigilance measures"* and *"adapted risk mitigation actions",* (ii) the broad and indeterminate nature of the reference to *"human rights"* and *"fundamental freedoms"* and (iii) the failure to strictly define the scope of the companies, contractors and activities covered by the vigilance plan.

It unsurprisingly found to be contrary to the Constitution the provisions on civil fines, intended to sanction indeterminate obligations. They forcefully reminded lawmakers of the principle that offenses and penalties must be defined by law, and of its corollary: the need for a clear and precise definition of obligations that carry penalties if not met.

The Constitutional Court also looked into section 2 of the law on the system of liability applicable to noncompliant companies and refused to interpret it as creating a new system of vicarious liability. They considered that the law merely reiterated the classic rules of civil liability for tort. In the words of the Constitutional Court, a company's liability can only be incurred on this basis if *"a direct cause-to-effect relationship is established between these breaches and the damage"*. It can, however, be regretted that the Constitutional Court did not issue a formal "reservation of interpretation" in this respect.

The law being of immediate application, companies need to quickly prepare a vigilance plan so as to be able to include it in their next annual report to their shareholders.

[1] "Le devoir de vigilance des sociétés donneuses d'ordre : bientôt en droit français" [available in French only], published on June 3rd, 2016 by Vincent Brenot

[2] "Adoption of a private members' bill on the duty of vigilance: new risks for large French companies", published on March 10th, 2017 by Vincent Brenot