ARTICLE

ADOPTION OF A PRIVATE MEMBERS' BILL ON THE DUTY OF VIGILANCE: NEW RISKS FOR LARGE FRENCH COMPANIES

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In the wake of the "Sapin II Act" of December 9, 2016, which, under the aegis of the new French Anti-Corruption Agency, forced companies to prevent the risk of corruption, the National Assembly went even further by adopting, on February 21, 2017, a private members' bill on the duty of vigilance of parent companies and principals. This law aims to require the largest French companies to draw up and implement "vigilance plans" aimed at preventing infringements of human rights, and harm to the health and safety of persons and of the environment, in France and abroad.

The *Conseil constitutionnel*, the highest constitutional authority, to which a referral was made on February 23, 2017, will have until March 23, 2017 at the latest to issue its opinion on the constitutionality of this legislation.

By creating legal obligations for companies, this bill marks a change of paradigm in the field of corporate social responsibility (CSR) (1). Concretely, this bill pursues preventive measures, based on the obligation to have a vigilance plan (2), and repressive measures, that is to say sanctions taking the form of damages and/or the payment of a civil fine (3). As this law is of immediate application, major French companies should move quickly to adapt their operations to ward off future litigation (4).

1. The bill marks a change of paradigm in the field of CSR

This bill is a legislative response to the strong media coverage of several human dramas that took place elsewhere, including the collapse of the Rana Plaza in Bangladesh in April 2013 that left more than a thousand dead. Its recitals specify that its ambition is to heighten the responsibility of the largest French companies by integrating the OECD guidelines for multinational enterprises as well as the UN guiding principles on business and human rights. For its sponsors, what is involved is *"to take a further step by transforming intentions into actions"*.

The bill seeks to change the current logic by creating strict legal obligations for parent companies and principals, *"where, for the time being, there is only an ethical obligation left up to the initiative of directors of good will (soft law) and a reporting requirement (§L. 225-102-1 of the Commercial Code* [the management report should specify the social and environmental impact of the company's operations]".

The current principle is that of the legal autonomy of legal persons. This principle means that, barring exceptions, a company is only accountable for its own acts. While there are already some exceptions to this principle under French law, they are limited (e.g. liability of a parent company for wrongful interference with the management of its subsidiary, cf. in particular Cass. com., February 3, 2015, appeal no. 13-24.895 or, under some conditions, as regards environmental damage caused by one of its subsidiaries, cf. Act no. 2010-788 of July 12, 2010 establishing a national environmental commitment (aka the "Grenelle II Act").

The bill stems from the opposite philosophy: parent companies and principals will be personally liable in case of infringement of human rights, fundamental freedoms, harm to the health or safety of persons or the environment, arising out of the operations of the company, of its subsidiaries or of its partners, including those that are based abroad.

2. Preventive measures: new requirement to draw up and publish a vigilance plan applicable to the largest French companies

2.1. Field of application

This requirement will apply as of the fiscal year in which the legislation is published, to companies and their direct or indirect subsidiaries with a headcount of 5,000 or more when their registered office is in France or of 10,000 or more when their registered office is located in France or abroad. The headcount requirement must be met on the end date of two consecutive fiscal years.

2.2. Content of the vigilance plan

The final version of the bill outlines the content of this plan, unlike its initial version. MPs were effectively concerned with the text being of direct application and avoiding the need for an implementing decree passed by the *Conseil d'État* – even though reference to the latter is still contained in it – that would roll back or soften the conditions of presentation and enforcement of this new duty of vigilance.

The new §L. 225-102-4-I of the Commercial Code details the *"reasonable vigilance measures of a nature to identify risks and ward against serious violations of human rights and fundamental freedoms, the health and safety of persons as well as of the environment"*. The measures to appear in the vigilance plan are the following:

- risk mapping;

- assessment procedures for subsidiaries, subcontractors or suppliers with whom they have an established business relationship;

- appropriate risk reduction or prevention actions for serious risks;

- a whistle-blowing mechanism to issue alerts and obtain reports concerning such risks; and

- a system to monitor and evaluate these measures.

2.3. Companies affected by the implementation of the vigilance plan

The measures implemented by the plan must not only cover the parent company but also the companies under its control. The plan must also be implemented at subcontractors and suppliers with whom there is an *"established business relationship"*.

The latter provision is objectionable both on a conceptual level and due to the practical constraints induced by it, subcontractors and suppliers effectively being independent contractors with establishments located abroad (in full or in part) or else spread out over several territories.

3. Punitive measures: sanctions for non-compliance of the duty of vigilance

3.1. Payment of a civil fine

Failure to comply with the requirements to draw up a vigilance plan (existence and content) exposes the company to a civil fine of a maximum of EUR 10 million. This fine is levied by the courts, to which a referral can be made by any interested party three months after having sent an unsuccessful cease and desist notice.

In case of absence of a plan or failure to apply a plan that has been adopted and that would have allowed avoiding the harm or damage, the infringer faces a fine that can be increased threefold (e.g. of up to EUR 30 million), in addition to having to make redress for the harm or damage in the strict sense of the term.

3.2. Redress

The new §L. 225-102-5 of the Commercial Code introduced a new source of liability on account of others in French law, since it makes the parent company or the principal liable to redress harm or damage *"that the performance of these requirements* [under the vigilance plan] *would have helped avoid"*.

While the absence of such plan risks creating a quasi-irrefutable presumption of infringement, its inadequacy or deficiency will in principle have to be proven by the complainant. For its part, the defendant will have the burden of showing that it has acted with the required standard of diligence, being under a duty of best efforts and not a strict performance duty. The courts will be inclined to lighten, if not reverse, the burden of proof in this area with the result that the defendant may be forced to present a force majeure defense.

4. Anticipating the application of the new law

4.1. The scope of the text remains unsure

The notion of *"established business relationship"* is one with which French companies are familiar, stemming from extensive case law developed in the context of claims of sudden termination of established business relations (§L. 442-6-I-5, Commercial Code). This notion encompasses any type of pre-contractual and contractual relationship, regardless of whether it has been formalized, provided the relationship is established (cf. in particular Cass. com., September 15, 2009, appeal no. 08-19.200). This last condition is met when the relationship is characterized by a *"certain stability"*.

The introduction in the bill of such a broad notion is a source of legal uncertainty for the companies concerned.

4.2. Need to adapt commercial and subcontracting agreements

As recommended in a previous newsflash,[1] it would be relevant for the companies concerned to introduce in the agreements entered into with their suppliers or subcontractors provisions permitting them to take the measures contemplated in their vigilance plan across the entire value chain.

These provisions could require regular reporting, commitments by partners to abide by the required standards in terms of human rights or environmental standards or else the possibility for companies under a duty of vigilance to carry out audits or inspections at the places covered by the plan.

4.3. An instrument for positive communication and with evidentiary value

In the litigation that will arise from the application of this law, the issue of evidence will be decisive. Discussions will effectively focus on the evidence furnished by parent companies and principals of the implementation of their vigilance plans. It will thus be necessary to document the actions taken in order to establish good faith. Steps should be taken as soon as possible to take account of the time that will be needed to properly negotiate amendments to agreements in progress with suppliers and subcontractors.

Companies will thus be able to defend themselves by showing proof that they monitor their vigilance plan seriously and effectively, specifically through reports on the implementation of measures published in their annual report or, as the case may be, on audits performed on the premises of companies covered by the plan. They will thereby be able to show the absence of any deficiency in the performance of their duty of vigilance and escape liability on this basis.

Once the vigilance plan has been set up and the preventive measures put in place, these actions can be used as an instrument for positive communication about and promotion of the company's CSR commitments, reputational issues being of increasing concern in the eyes of employees, customers and commercial partners.

[1] “Le devoir de vigilance des sociétés donneuses d’ordre: bientôt en droit français”, untranslated article in French published on June 3, 2016 by Vincent Brenot