

## Creating a Public Authority to Enforce the Duty of Vigilance Law: A Step Backward?

Almost four years after its adoption, the provisions of the French Duty of Vigilance Law (DV Law) are not respected by many companies, leading some to call for the creation of a dedicated supervisory authority.

Contrary to the provisions of the Sapin 2 Law (creating the French Anti-Corruption Agency, AFA),<sup>1</sup> the enforcement of the DV Law relies exclusively on the courts, as “*any interested person*” may request the court to order, including under penalty, a company to comply with its obligations (Article L. 225-102-4 II of the French Commercial Code), or to order compensation for the damage caused by its lack of vigilance (Article L. 225-102-5). The creation of a monitoring, controlling and/or sanctioning authority would therefore require a revision of the DV Law or at least, depending on its attributions, the adoption of an administrative decree.

The creation of such an authority is also one of the recommendations of the Resolution on human rights and environmental due diligence and corporate accountability, adopted by the European Parliament on 10 March 2021 (the EP Resolution).<sup>2</sup>

However, the creation of such an authority is not self-evident. Rather, the experience of existing administrative authorities indicates that, far from guaranteeing better implementation of the DV Law, the creation of an authority may distort the duty of vigilance – turning it into a compliance exercise and allowing companies to avoid liability (1). To strengthen the implementation of the duty of vigilance, it seems preferable to reinforce existing liability mechanisms (2).

### **1. The risks of a supervisory authority in matters of vigilance**

Whatever its modalities, the creation of a duty of vigilance’s supervisory authority presents significant risks.

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<sup>1</sup>Law n° 2016-1691 of 9 December 2016 *relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique*.

<sup>2</sup> European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)).



### 1.1. Supervisory authority and transparency

Firstly, it has been suggested that a supervisory authority could be empowered to verify whether companies have published a vigilance plan, and possibly sanction companies that have not.

However, **limiting the role of a public authority to such a control may distort the content of the duty of vigilance, and limit it to a formal reporting obligation**– whereas the vigilance plan must be understood as being only the support of the duty of vigilance. Parliamentary work,<sup>3</sup> commentators<sup>4</sup> and case law<sup>5</sup> recognise that the publication of the vigilance plan is not an end in itself but that it purports to facilitate judicial actions against failing companies.

In reality, the designation of a supervisory authority is not a guarantee of transparency. **The experience of the EU Timber<sup>6</sup> and Conflict Minerals<sup>7</sup> Regulations, which provide for the designation of national enforcement authorities, demonstrates the opacity of the monitoring carried out by these administrations.** The Directorate General for Development, Housing and Nature,<sup>8</sup> in charge of enforcing the Conflict Minerals Regulation in France, refused to communicate to Sherpa the list of the companies subject to this regulation, in the name of trade secrecy.<sup>9</sup> Also, the administrations in charge of applying the Timber Regulation (the Regional Directorates of Agriculture, Food and Forestry<sup>10</sup> and the Ministry of Ecological Transition) do not publish any information on the companies concerned or the controls carried out.<sup>11</sup>

**Similarly, there is no guarantee that sanctions imposed by an administrative authority (unlike a court) would be made public.** The Conseil d'État has notably considered that the administration was entitled, under Article L. 311-6 of the French Code of Relations between the Public

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<sup>3</sup> Report of the French Law Commission of 11 March 2015, pp. 34 and 35.

<sup>4</sup> Juliette Tricot, Tatiana Sachs, “La loi sur le devoir de vigilance : un modèle pour (re)penser la responsabilité des entreprises”, *Droit et Société*, No 106/2020.

<sup>5</sup> Judicial Tribunal of Nanterre, Order of 11 February 2021, No 20/00915.

<sup>6</sup> Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market.

<sup>7</sup> Regulation (EU) No 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas.

<sup>8</sup> In France, *Direction générale de l'aménagement, du logement et de la nature*.

<sup>9</sup> “Le secret des affaires invoqué par le Ministère de la transition écologique : Sherpa saisit le juge administratif”, 14 October 2020 [<https://www.asso-sherpa.org/le-secret-des-affaires-invoque-par-le-ministere-de-la-transition-ecologique-sherpa-saisit-le-juge-administratif> - Consulted 08/04/2021]

<sup>10</sup> In French, *Directions régionales de l'agriculture, de l'alimentation et de la forêt*.

<sup>11</sup> According to WWF, only 3 of the 16 national competent authorities responsible for enforcement of the Timber Regulation published information in 2019 on their enforcement procedures. See WWF Enforcement Review of the EU Timber Regulation (EUTR) - EU Synthesis Report, December 2019, Brussels, p.5.



and the Administration, to refuse to communicate to non-governmental organisations the list of companies sanctioned for non-compliance with equal pay for women and men, because the disclosure of this information could be prejudicial to the sanctioned companies.<sup>12</sup>

## 1.2. Recommendations and support for companies

A role of "*promoting the duty of vigilance*" and "*supporting companies*" is also envisaged and appears for instance in the recommendations of the report of the Conseil Général de l'Économie of January 2020,<sup>13</sup> and in the EP Resolution (Article 12).

**However, given the number of general and sectoral recommendations that already exist in this area, giving an authority the power to issue additional guidelines seems both unnecessary and risky.**

For example, in the field of corruption, the AFA Sanctions Committee considered that a company's compliance with the AFA's general guidelines – or worse, the mere fact that the company claims to apply them – gives rise to a presumption of compliance in favour of the company.<sup>14</sup>

On the other hand, even if these guidelines have a high level of requirements, they cannot necessarily be used against companies. In the field of corruption, the AFA Sanctions Committee has doubly limited its ability to sanction a company that has not followed an AFA recommendation. Indeed, for a breach to be found, the obligation in question must, first, necessarily and explicitly have been provided for in the recommendations and, second, not go beyond the requirements and measures provided for by the Sapin 2 Law.<sup>15</sup> The Commission also considered that the risk mapping methodology recommended in the AFA's general recommendations was not binding.<sup>16</sup>

## 1.3. Control of the plan vigilance and avoidance of liability

Finally, the EP Resolution proposes that national supervisory authorities should also have extensive powers to control vigilance: receipt of alerts; control of the content of the vigilance plan; formal notices; administrative sanctions.

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<sup>12</sup> Conseil d'État, 10th - 9th joint chambers, 3 June 2020, No 421615.

<sup>13</sup> CGE, « Évaluation 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 », Recommendation No 2, p. 20.

<sup>14</sup> AFA, Commission des sanctions, 20 February 2020, No 19-02, Sté I. et M. C. K., par.16, p. 16.

<sup>15</sup> Ibid, par. 19, p. 16.

<sup>16</sup> AFA, Commission des sanctions, 4 July 2019, No 19-01, Sté S. SAS et Mme C. If the company chooses to deviate from these rules, it is up to the company to demonstrate « *la pertinence, la qualité et l'effectivité de son dispositif de détection et de prévention de la corruption* » - AFA, Commission des Sanctions, 20 February 2020, No 19-02, op. cit., para. 17, p. 16.



In reality, a control of vigilance plans (or their implementation) by an administrative authority would unlikely reinforce corporate accountability for human rights and environmental abuses, quite the contrary.

**First, such a control is contrary to the logic of the duty of vigilance as an obligation of constant behaviour, which must be assessed in a concrete manner:** has the company taken reasonable and appropriate vigilance measures in the face of a particular risk or in the face of violations observed in its value chain? Today, it is up to the judge, after an adversarial debate, to concretely assess the sufficiency of the vigilance measures (their "adequate" and "reasonable" character, their "effective" implementation) and, in case of a lack of vigilance, to order the company to compensate for the damage suffered. The concept of vigilance indeed comes from French civil liability law, where it has been used to characterise negligence.<sup>17</sup>

On the contrary, **an ex ante control of measures by an administrative authority would increase the risk that the duty of vigilance be interpreted in a superficial and formalistic way, as a simple obligation to put in place internal risk management processes.** These internal processes (codes of conduct, certifications, social audits, etc.) are currently well known to companies and have demonstrated their insufficiency. Moreover, **such a control seems incompatible with the extraterritorial scope of the duty of vigilance: insofar as such an authority will have difficulty in assessing the existence of violations in foreign subsidiaries or suppliers (and therefore the effectiveness of measures), its control will likely be superficial.**

In the area of corruption, and in the context of such a control, the AFA has given companies considerable leeway.<sup>18</sup> For example, the AFA Sanctions Committee rejected the argument that the specificities of countries and sites were not considered, on the grounds that the AFA's recommendations "do not impose any predefined level of granularity."<sup>19</sup>

Second, there is a risk that ex ante control will make it easier for companies whose plan has been controlled to defend themselves in the event of legal action: the validation of the plan by the supervisory authority could be used by the companies in the event of litigation before civil courts and could be an obstacle to any legal challenge of the plan and the measures implemented.

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<sup>17</sup> See for example Cass. civ. 1e, 7 March 2006, No. 04-16.179.

<sup>18</sup> Alice Dunoyer de Segonzac, Charles-Henri Boeringer, "Contrôles de l'Agence française anticorruption - Quels enseignements tirer de la deuxième décision de la commission des sanctions de l'AFA ?", La Semaine Juridique Entreprise et Affaires No 27, 2 July 2020, p. 1263 : "Bien que plus sévère en apparence à l'égard de la société attrait, cette décision est une bonne nouvelle pour les entreprises assujetties aux obligations prévues par l'article 17 de la loi Sapin II. [...] Les entreprises se voient consentir une certaine marge de manœuvre dans la mise en œuvre de leur stratégie de lutte contre la corruption."

<sup>19</sup> AFA, Commission des sanctions, 20 Feb. 2020, No 19-02, Sté I. et M. C. K., par. 27, p. 18.



Third, no financial penalty has yet been imposed by the AFA's Sanctions Committee. The AFA's role is above all to assist and support companies, and the Sanctions Committee considers the efforts and measures implemented by the company in question up to the date of its decision.

Fourth, the logic at work in the field of corruption is currently distinct from that of human rights and environmental violations. The logic of corruption is that of "compliance", which complements an existing repressive arsenal. This repressive arsenal does not exist for human rights and environmental violations.

As Juliette Tricot and Tatiana Sachs point out, the logic at work with the Sapin 2 Law is that of avoiding liability, whereas the duty of vigilance Law aims to organize the conditions of liability: *"The Sapin 2 Law illustrates how, when sifted through the sieve of compliance, the conditions of criminal liability are metamorphosed without any need to modify the substantive rules that establish it. This is the tour de force of the logic of compliance which, without excluding criminal liability, organizes its avoidance."*<sup>20</sup>

Even if many actors are now seeking to bring the DV Law into the realm of compliance, this results neither from the text (which is linked to civil liability law) nor from the intention of the legislator, whose primary objective was *"to prevent tragedies in France and abroad and to obtain compensation for victims in the event of human rights violations and environmental harms."*<sup>21</sup>

**The confusion between vigilance and compliance tends to undermine the ambition of the duty of vigilance, by reducing it to the control, by the economic actors themselves, of the rules that apply to them, in a logic of renunciation of the judicial power.**<sup>22</sup>

Finally, while there has been talk of expanding the competencies of an existing authority such as the OECD National Contact Point in France (NCP), it is crucial to recall that the shortcomings of this multi-stakeholder mediation mechanism, such as its lack of independence, opacity, lack of procedural safeguards and ineffectiveness,<sup>23</sup> have been repeatedly denounced, prompting boycotts by civil society organizations.<sup>24</sup> The NCP cannot serve as a competent authority or even as a model in this area.

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<sup>20</sup> Juliette Tricot et Tatiana Sachs, "La loi sur le devoir de vigilance : un modèle pour (re)penser la responsabilité des entreprises", *Droit et Société*, No 106/2020 [our translation].

<sup>21</sup> Proposition de Loi No. 2578 of 11 February 2015 [our translation].

<sup>22</sup> Sandra Cossart, Tiphaine Beau de Loménie, Antoine Lubrani, "Extension du domaine de la vigilance, la loi sur le devoir de vigilance, au-delà de la compliance", *Revue des juristes de Sciences Po*, n° 16, January 2019, p. 90.

<sup>23</sup> According to OECD Watch, between 2000 and 2015, only 1% of the "specific circumstances" referred to the various NCPs had resulted in any form of improvement on the ground (OECD Watch, *Remedy Remains Rare*, 2015).

<sup>24</sup> See the letters sent by nine associations, including Sherpa, to the Minister of Economy and Finance and the President of the French NCP of the OECD in March 2018 and January 2019 [[https://www.asso-sherpa.org/wp-content/uploads/2019/03/Avis-pour-la-CNCDH-VF\\_3\\_compressed-3\\_compressed-](https://www.asso-sherpa.org/wp-content/uploads/2019/03/Avis-pour-la-CNCDH-VF_3_compressed-3_compressed-)



## 2. Ways to reinforce the implementation of the duty of vigilance

Instead of creating a supervisory authority, other means should be preferred to reinforce the effectiveness and implementation of the duty of vigilance: on the one hand, facilitating legal actions and reinforcing the liability regime for companies; on the other hand, developing the role of prosecution authorities in this area, including by criminally prosecuting companies.

### 2.1. Facilitating court cases

#### Facilitating access to information held by companies

The relatively low number of legal actions brought against defaulting companies so far can be explained, amongst other things, by the difficulties of accessing information held by the company that is essential to characterize the lack of vigilance or causality (names of suppliers, prevention measures implemented, etc.). Neither the publication of non-financial statements nor the publication of vigilance plans can currently remedy this asymmetry of information. The measures of investigation *in futurum* provided for by article 145 of the French Code of Civil Procedure are also insufficient, as demonstrated by Perenco's refusal to apply a court order which concerned documents relating to its activities in the Democratic Republic of Congo.<sup>25</sup>

**Thus, several academics recommend the creation of mechanisms for third parties to access information held by companies which, as in the case of access to administrative documents, could in the event of refusal give rise to a judicial review.**<sup>26</sup> This recommendation, long promoted by Sherpa, is also being considered at the European level in the form of a *right to know*.<sup>27</sup>

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[2.pdf#page=25](#) – Consulted 08/04/2021] and the collective tribune published in the *Nouvel Obs* on October 16, 2019.

<sup>25</sup> *Le Monde*, « Perenco, boîte noire pétrolière et toxique en RDC », October 9, 2019, [[https://www.lemonde.fr/afrique/article/2019/10/09/perenco-boite-noire-petroliere-et-toxique-enrdc\\_6014880\\_3212.html](https://www.lemonde.fr/afrique/article/2019/10/09/perenco-boite-noire-petroliere-et-toxique-enrdc_6014880_3212.html)] - Consulted 08/04/2021] and S. Cossart, L. Bourgeois, « L'article 145 du Code de procédure civile : un outil insuffisant pour la preuve des violations économiques de droits fondamentaux », *Semaine sociale Lamy*, 5 October 2020, p. 10.

<sup>26</sup> Aude Solveig-Epstein, « La comptabilité du droit d'accès aux informations environnementales de source privée avec la protection du secret des affaires : prélude à la consécration d'un droit d'accès aux données d'intérêt général de source privée », *Revue juridique de l'environnement*, 2020, vol. 45, pp. 137-149.

<sup>27</sup> Parlement européen, Directorate General for External Policies, « Human Rights Due Diligence Legislation - Options for the EU », June 2020.



### **Providing for a specific civil liability regime**

To reinforce the implementation of the duty of vigilance, **it is also necessary to provide for a specific civil liability regime, and in particular to reverse the burden of proof that currently falls on the victims and civil society organisations.**<sup>28</sup>

The company in question is indeed in the best position to prove that the measures taken are appropriate and effective in preventing the harm.

### **Designating specific courts**

Designating courts with special competence in the field of duty of vigilance could also make it possible to concentrate litigation, to allow for the specialization and expertise of judges, and to develop coherent case law on these complex legal issues, which are at the crossroads of company law, civil liability law, international human rights law and fundamental freedoms, environmental law and labour law.<sup>29</sup>

## **2.2. Strengthening prosecutors' legal actions against companies**

### **The role of the Public Prosecutor's Office in civil proceedings**

It is accepted that the Public Prosecutor's Office, as the representative of the general interest and the defender of public order, may play a role in civil proceedings as the principal party, either in the cases specified by law or in the absence of express provisions to that effect, when it acts "*for the defence of public order on the occasion of facts that affect it*" (article 423 of the French Civil Code). Public order within the meaning of article 423 is traditionally interpreted as including social and economic public order.<sup>30</sup>

In the absence of an express provision,<sup>31</sup> Article 423 could thus allow the competent public prosecutor to give formal notice to a company that does not comply with its duty of vigilance and, as an interested party, to sue it on the ground of Article L. 225-102-4 I of the French Commercial Code. Thus, to ensure the implementation of the duty of vigilance, the government could recommend that the competent prosecutors rely on these provisions to initiate civil cases.

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<sup>28</sup> "Vers une législation européenne sur la responsabilité des multinationales - Recommandations d'organisations ayant défendu la loi française relative au devoir de vigilance", December 2020.

<sup>29</sup> This is currently envisaged as part of the French Bill No. 3875 on Climate Change and Resilience.

<sup>30</sup> Frédéric Arbellot, « L'action d'office du ministère public prévue à l'article 423 du Code de procédure civile », La Semaine juridique (édition générale), n° 24, 16 June 2014.

<sup>31</sup> See, for example, Article L. 442-4 of the French Commercial Code concerning restrictive business practices, or Article L. 210-11 of the same code concerning purpose companies ("*sociétés à mission*").



### **Criminal liability of parent companies regarding their duty of vigilance**

Moreover, the duty of vigilance could very well constitute an obligation of care or safety within the meaning of article 121-3 of the French Criminal Code relating to non-intentional offences (« *carelessness, negligence or failure to comply with an obligation of care or safety* »<sup>32</sup>) and the deliberate endangerment of others.<sup>33</sup>

For example, the Criminal Division of the Court de Cassation considered that the failure to establish a prevention plan in the field of construction and public works, as provided for in article R. 4512-6 of the French Labour Code, constituted a breach of a safety obligation.<sup>34</sup> A judge could thus characterize the failure to establish an appropriate vigilance plan or the absence of effective implementation of the prescribed vigilance measures as a breach of an obligation of care or safety that constitutes the moral element of an unintentional offence or, in the event of a deliberate breach, an offence of deliberately endangering the person of others.

In addition to non-intentional offenses, a failure to exercise its duty of vigilance could contribute to the moral and material elements of certain intentional offenses, such as the offense of concealment (Article 321-1 of the French Criminal Code).

But a legislative recast is necessary to strengthen the criminal aspect of the duty of vigilance. This was the purpose of the first bill on the duty of vigilance, proposed by parliamentarians in 2013 and developed by Sherpa.<sup>35</sup> The creation of an autonomous material offence for the failure to publish a plan is certainly insufficient in this respect, as is the introduction of autonomous sectoral offences such as the offence of breach of due diligence concerning timber imports.<sup>36</sup>

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<sup>32</sup> « *faute d'imprudence, de négligence ou de manquement à une obligation de prudence ou de sécurité prévue par la loi ou le règlement* ».

<sup>33</sup> Article 223-1 of the French Criminal Code. See Yann Queinnec et Félix Feunteun, "La preuve de vigilance, un challenge d'interprétation", *Revue Lamy Droit des Affaires*, n°137, May 2018, p. 23 ff.

<sup>34</sup> Cass. Crim., 27 March 2012, No 11-84.078.

<sup>35</sup> Proposition of Law No 1519 of 6 November 2013.

<sup>36</sup> Article 76, Law n° 2014-1170 of 13 November 2014.