

FRANCE'S CORPORATE DUTY OF VIGILANCE LAW

A Closer Look at the Penalties Faced by Companies



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The penalties set out in France's new law on the "duty of vigilance for parent and instructing companies" the "Law" make it stand out from other foreign laws that address similar issues, but that are often viewed as less stringent. After causing tension during parliamentary debates, these penalties were also singled out by the French Constitutional Court [*Conseil constitutionnel*] during its review of the Law; and the civil fine was held unconstitutional.

This article focuses on the two remaining penalties, which have received less commentary to date: periodic penalty payments [*astreintes*] and civil liability action [*responsabilité civile*]. It analyses whether, and the extent to which, implementation of these penalties is likely to be genuinely effective in achieving the Law's twofold objective: remediation and prevention.

This article suggests that the Law's provisions on civil liability afford limited opportunity for victims of adverse human rights impacts to bring actions before the courts, thereby falling short on the goal of remediation. However it also concludes that the Law's set of penalties does act as an effective tool for ensuring corporate accountability and preventing human rights abuses through increased scrutiny and deterrence.

L. n° 2017-399, 27 March 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre : JO 28 March 2017, texte n° 1

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The penalties set out in France's new law on the "duty of vigilance for parent and instructing companies" (the "Law") make it stand out from other foreign laws that address similar issues (but that are often viewed as less stringent).¹ After causing tension during parlamenta-

ry debates, these penalties were also singled out by the French Constitutional Court [*Conseil constitutionnel*] during its review of the Law. Now that the civil fine provided for in the original draft of the Law has been found unconstitutional,² the number of potential penalties faced by companies failing to comply with the Law has been reduced to two: namely, (i) periodic penalty payments [*astreintes*] and (ii) civil liability action [*responsabilité civile*] [Translator's note: periodic penalty payments are injunctive fines payable on a daily or per-event basis until the defendant satisfies a given obligation].³

This article will focus on these two penalties, which have to date attracted little commentary,⁴ with a view to shedding light on their

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1 Modern Slavery Act 2015 (UK). See S. Brabant, « Devoir de vigilance : une proposition de loi (pas vraiment) raisonnable », *Le Monde*, 17 Jan. 2017 (for the comparison with the Modern Slavery Act).

2 Cons. const., Dec. no. 2017-750 DC, 23 March 2017.

3 Formal notice to comply must be issued before a periodic penalty payment can be ordered; a civil liability action may also be followed by the publication of the court decision.

4 For a general review of the Law, see S. Schiller, « Exégèse de la loi sur le devoir de vigilance et entreprises donneuses d'ordre », *JCP E* 2017, 1193, p. 19. - C. Malecki, « Le devoir de vigilance des sociétés mères et entreprises donneuses

effectiveness in terms of meeting the Law's twofold objective: remediation and prevention. According to the explanatory memorandum of the draft Law [*exposé des motifs*], the goal is to “encourage multinational companies to act responsibly with the aim of preventing tragic events” in France or abroad that would violate human rights and harm the environment, and to “obtain remediation for the victims” where damage is sustained.⁵

Before discussing the penalties, we need briefly to define the scope of the Law and the substance of the duty of vigilance.⁶ The Law applies to “any company that employs, for a period of two consecutive financial years, at least five thousand employees itself and in its direct or indirect subsidiaries whose registered office is located within French territory, or at least ten thousand employees itself and in its direct or indirect subsidiaries whose registered office is located within French territory or abroad”. The majority of legal commentators consider that companies within the scope of the Law will be those incorporated in France under the form of an SA [*Société Anonyme*], an SCA [*Société en Commandite par Actions*] or an SAS [*Société par Actions Simplifiée*].⁷ It follows that the duty of vigilance will only apply to French-incorporated companies, and so will the relevant penalties.

The duty of vigilance comprises three obligations (the “Vigilance Obligations”). First, companies must establish a vigilance plan. This plan sets out “reasonable vigilance measures for identifying risks and preventing serious human rights abuses [...] that result from the activities of the company or of companies it controls [...] directly or indirectly, or from the activities of any subcontractors or suppliers with which the company has an established commercial relationship, where these activities are connected to the relationship” (C. com., art. L. 225-102-4, I). Second, the plan must be effectively implemented. Third, the plan and the report on how the plan is effectively imple-

mented must be made public and included in the company's annual management report (C. com., art. L. 225-102-4, I).⁸

The analysis of the penalties provided by the Law indicates that:

- There are a number of issues with civil liability that weaken its impact in terms of securing remediation for victims.
- However as monitoring and deterrent tools, these penalties seem to be sufficiently effective in achieving the objective of holding companies accountable so as to prevent human rights abuses.

1. The Law's Penalties: Insufficient Remedy for Victims

A. - Uncertainty over the Conditions for Establishing Civil Liability

The Law provides that companies failing to comply with the Vigilance Obligations will have to remedy the damage that “the execution of these obligations could have prevented” (C. com., art. 225-102-5). As underlined by the French Constitutional Court, civil liability is based on the general law of tort [TN: under the French law of tort, an individual is liable for his/her own fault (*responsabilité pour faute*) except in certain circumstances, where an individual can be liable for the fault of someone else (*responsabilité du fait d'autrui*)].⁹ There are three conditions for establishing civil liability under the general law of tort: damage, a breach of one of the obligations defined in the law and causation between the two. The burden of proof is on the claimant who has to prove the case satisfies all three conditions. Breach and causation are likely to be the most difficult elements for a claimant to establish under the Law for the reasons stated below.

First, according to the transcripts of parliamentary debates, a breach of the Vigilance Obligations is constituted by “the failure to establish, publish or effectively implement a vigilance plan”.¹⁰ However, the French Constitutional Court has declared that this breach was defined in an “insufficiently clear and precise” manner with respect to constitutional requirements that criminal offences and penalties be defined by law¹¹ [*légalité des délits et des peines/nullum crimen nulla poena sine lege*]. As a result, the civil fine, considered as an equivalent to a criminal penalty, was deemed unconstitutional. Although this definition of the breach was deemed unconstitutional from the perspective of criminal law, it remains a condition for any finding of civil liability, despite being “insufficiently clear and precise”.

Moreover, the obligation to effectively implement a vigilance plan was specifically introduced by the Law as an obligation on companies to take all steps in their power to reach a certain result [*obligation de moyens*] rather than to guarantee the actual attainment of that result [*obligation de résultat*]. As a result, a breach of that obligation

d'ordre : était-ce bien raisonnable ? », *Bull. Joly Sociétés* 2017, p. 298. - Un plan de vigilance imposé aux sociétés employant au moins 5 000 salariés, *Editions F. Lefebvre*, 5 Apr. 2017. - N. Cuzacq, « Le devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre : acte II, scène 1 », *D.* 2015, p.1049 (on proposed law no. 2578 of 11 February 2015).

5 AN, proposed law no. 2578, 11 Feb. 2015, p. 4.

6 These issues warrant further discussion, particularly because the French Constitutional Court has remarked upon imprecisions contained in certain provisions of the Law. See Cons. const., Dec. no. 2017-750 DC, op. cit.

7 According to the transcripts of parliamentary debates - and as it is not clearly specified in the Law itself - it applies to companies whose registered office is located in France. This interpretation of the scope of the Law is also in line with that of the Constitutional Court. See Cons. const., Dec. no. 2017-750 DC, op. cit., § 3. - On the corporate forms of the companies concerned and whether or not the SAS should be included, see S. Schiller, « Exégèse de la loi sur le devoir de vigilance et entreprises donneuses d'ordre », op. cit., esp. p. 20. - C. Malecki, « Le devoir de vigilance des sociétés mères et entreprises donneuses d'ordre : était-ce bien raisonnable ? », op. cit., esp. p. 298. - P.-L. Périn, « Devoir de vigilance et responsabilité illimitée des entreprises : qui trop embrasse mal étreint », *RTD com.* 2015, p. 215, esp. p. 218 (on proposed law no. 2578 of 11 February 2015). - Contra, « Un plan de vigilance imposé aux sociétés employant au moins 5 000 salariés », op. cit. - AN, report no. 2628, 11 Mar. 2015, p. 83 (which provides that the Law could only apply to SA companies). The Law apparently also applies to SE [*Société Européenne*] companies by reference to articles L. 229-1 and L. 229-8 of the French Commercial Code [*Code de commerce*].

8 This report corresponds to the one provided for in article L. 225-102 on employee shareholding, which is included in the annual management report.

9 See Cons. const., Dec. no. 2017-750 DC, op. cit., § 27. New article L. 225-102-5 refers to articles 1240 and 1241 of the French Civil Code [*Code civil*] (formerly 1382 and 1383).

10 AN, report no. 2628, op. cit., p. 30.

11 See Cons. const., Dec. no. 2017-750 DC, op. cit., § 13.

cannot be inferred merely because damage has been caused.¹² With this in mind, how is it possible to assess whether or not a given company has fulfilled its obligation to effectively implement a vigilance plan? The transcripts of parliamentary debates on the Law provide indications to assess whether a company has fulfilled its obligation. Such indications include: contractual commitments, certifications, partnerships with stakeholders, etc.¹³ Further, it remains to be seen whether it would be enough for a vigilance plan to incorporate all of the measures listed in the Law (including “suitable actions to mitigate risks or prevent serious abuses”) to be deemed to “contain reasonable vigilance measures”¹⁴ (C. com., art. L. 225-102-4, 1). The ambiguity of certain terms in the Law raises the question of how to assess the effectiveness of a vigilance plan.¹⁵

In addition to the uncertainty over the boundaries of what constitutes a breach, the Law contains a further source of difficulty: proving causation. There are many different ways in which damage could arise, especially with long supply chains involving multiple players. The court would need to assess whether a breach of the Vigilance Obligations caused the damage and consider the impact of any other relevant factors. It would then have to determine if meeting those obligations would have prevented the damage (C. com., art. L. 225-102-5¹⁶). At this point, the parties may disagree on whether the adequate causality [*causalité adéquate*] theory or the equivalence of conditions [*équivalence des conditions*] theory should apply to the question of causation, with each party likely to favour the theory that best supports their case. Either way, however, each theory presents various difficulties for claimants [TN: the theory of adequate causality and the equivalence of conditions are the two main theories of causation under French civil liability law. The theory of equivalence of conditions is based on the idea that each factor contributed to cause the damage. In that case, each factor is considered as having caused the damage. The theory of adequate causality seeks to find the most likely determining cause of the damage].¹⁷ The United Nations Guiding Principles on Business and Human Rights (the “Guiding Principles”), which inspired the Law, distinguish between situations in which a company caused, contributed or was simply linked to the adverse impact. The appropriate action required under the Guiding Principles depends on this

distinction.¹⁸ The distinction could also offer useful guidance to the French courts when dealing with the ambiguous notion of causation.

In terms of substance, ambiguous concepts such as breach and causation can be particularly difficult for a claimant to prove. This can make it difficult to establish civil liability and can weaken the objective of providing remediation for victims. This is all the more so in circumstances where the victims already have limited options for bringing a civil liability action.

B. - Victims Have Limited Possibility to File a Civil Liability Action

Civil liability actions must also be assessed from the perspective of those who might file them. Although one of the Law’s objectives was to offer French or foreign victims a right to remediation from parent or instructing companies based in France,¹⁹ it is, in practice, particularly complex for a foreign victim to gain access to the French courts.²⁰

The French Constitutional Court notes that the general rules of civil liability cannot be understood as “allow[ing] actions to be brought on behalf of the victim by a third party, since only the victim has standing [*locus standi*].”²¹ In practice, victims cannot easily access the courts, especially victims living in distant countries who may not be aware of their rights under the Law or of the relevant procedural rules in France. Furthermore, material, social, institutional and linguistic circumstances may not empower them to take legal action before French courts.

In addition, in France the power of non-profit organisations and trade unions to bring class actions for remediation in a civil court for damage actually incurred by third parties,²² or even by their own

12 AN, report no. 2628, op cit., p. 31, 55 and 59. - AN, report no. 3582, 16 March 2016, p. 14. - Contra, Four proposed laws issued prior to the Law in 2013 and 2014 and covering the same issues all provided for a strict liability [*présomption simple de responsabilité*]. See. N. Cuzacq, « Commentaires des propositions de loi relatives au devoir de vigilance des sociétés mères et entreprises donneuses d’ordre », *Rev. dr. trav.* 2014, p. 265.

13 AN, report no. 2628, op cit., p. 79.

14 Emphasis added.

15 P.-L. Périn, « Devoir de vigilance et responsabilité illimitée des entreprises : qui trop embrasse mal étreint », op. cit., esp. p. 223 (also noting, on the proposed law of 11 February 2015, the ambiguity of certain terms used therein, including standards to be respected).

16 “[...] any person found to have breached the obligations defined in article L. 225-102-4 of this Code may be held liable and required to repair the damage that would have been avoided had he/she complied with said obligations”.

17 N. Cuzacq, « Le devoir de vigilance des sociétés mères et des donneurs d’ordre », in *La RSE saisie par le droit, perspective internationale*, (eds.) K. Martin-Chenut and R. De Quenaudon : Editions Pedone, 2016, p. 453, esp. p. 461.

18 UNCHR, Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework, 2011, principles 13, 19 and commentary under principle 19. - See also, United Nations, The Corporate Responsibility to Respect Human Rights, an interpretative Guide, 2012.

19 See also P.-L. Périn, « Devoir de vigilance et responsabilité illimitée des entreprises : qui trop embrasse mal étreint », op. cit., esp. p. 223. – On the options for bringing an action before French courts, AN, report no. 2628, op. cit., p. 29 and 30. – See also O. Boskovic, « Brèves remarques sur le devoir de vigilance et le droit international privé », *D.* 2016 p. 385. – On the general jurisdiction of the French courts in civil law matters and other issues related to the right to an effective remedy, see Min. des Affaires étrangères et du développement international, *Plan national d’action pour la mise en œuvre des principes directeurs des Nations unies relatifs aux droits de l’Homme et aux entreprises* [French Ministry of Foreign Affairs and International Development, National Action Plan for implementing the United Nations Guiding Principles on Business and Human Rights], April 2017, p. 54 to 58.

20 Access is a counterpart to victims’ right to an effective remedy in the courts as guaranteed under article 8 of the Universal Declaration of Human Rights. For a broader, more international portrait of what obstructs victims’ access to justice, see R.-Cl. Drouin, « Le développement du contentieux à l’encontre des entreprises transnationales : quel rôle pour le devoir de vigilance ? », *Dr. soc.* 2016, p. 246, esp. p. 252 to 254.

21 See Cons. const., Dec. no. 2017-750 DC, op. cit., § 28.

22 J. Héron and Th. Le Bars, *Droit judiciaire privé*, Montchrestien, 2012, esp. p. 96 to 101.

members,²³ is quite limited. NGOs would like to see victims have more options for obtaining remedies through class actions with the broadening of the scope of such actions.²⁴

As the Law currently stands, if victims of serious human rights abuses abroad are working for an entity within the scope of a vigilance plan, they have very little chance of being able to bring a civil liability action before the courts in France.²⁵ Nonetheless, as we discuss below, the penalties provided in the Law can effectively contribute to the objective of prevention.

2. The Law's Penalties: Effective Prevention of Human Rights Abuses

A. - Penalties as a Tool for Monitoring and Deterrence

The penalties under the Law are designed to encourage companies to effectively implement the Vigilance Obligations, thereby achieving the Law's preventive goals. For example, the Law imposes periodic penalty payments if companies within its scope do not fulfil their obligations to establish, publish and effectively implement a vigilance plan. The amount of such periodic penalty payments, to be decided by the judge, may need to be sufficiently large to bring about swift changes in companies' behaviour. Once a periodic penalty payment has been imposed, it should encourage the company to satisfy its Vigilance Obligations to limit the possibility of damage ensuing.

A periodic penalty payment can be sought by any party with standing. Once a company has failed to comply with its Vigilance Obligations, after having been given three months' official notice [*mise en demeure*] to comply, such party can ask the competent court to order the company to comply (C. com., art. L. 225-102-4, II²⁶). Given the many kinds of parties that may be able to prove they have standing (including victims, NGOs and trade unions²⁷), this procedure is a privileged tool for members of civil society to check whether the Vigilance Obligations are being observed, irrespective of whether any actual damage has been sustained.

23 *Associations. Fondations - Congrégations. Fonds de dotations*, coll. Mémento pratique : Editions F. Lefebvre, 2016, esp. p. 232, p. 233 and p. 245.

24 French Ministry of Foreign Affairs and International Development, *Plan national d'action pour la mise en œuvre des principes directeurs des Nations unies relatifs aux droits de l'Homme et aux entreprises*, op.cit., p. 56 (noting the option of class actions in several fields, especially discrimination, health, personal data protection). - Sherpa, press release, « Réaction publique de Sherpa au Plan national d'action pour la mise en œuvre des Principes directeurs des Nations Unies relatifs aux droits de l'Homme et aux entreprises », 4 May 2017 (recommending that the option of bringing class actions be extended to cover human rights).

25 In certain cases, moreover, remediation is even less likely since subcontractors involved in adverse human rights impacts are not necessarily within the scope of the vigilance plan, if they have *no established* commercial relationship [*relation commerciale établie*] with the French company.

26 "The case may also be referred for the same purpose to the president of the court in the context of interim/emergency proceedings [*statuant en référé*]."

27 Amendment no. 65 submitted for text no. 2628 on a first reading in the French National Assembly on 26 March 2015. Competitors of companies subjected to the Vigilance Obligations may also have standing to refer a case to the courts.

As for civil liability, despite the difficulties faced by victims wishing to bring an action before the courts (as discussed above), the very existence of such a possibility constitutes both a legal and financial risk for companies. That risk could be difficult for companies to quantify due to the present uncertainty surrounding the court's interpretation of the conditions necessary to establish that civil liability. Companies might therefore be wary of those risks, in addition to the reputational risk related to a civil liability action under the Law. Indeed, if a company is found liable, the court could order its decision to be published, disseminated or displayed (C. com., art. L. 225-102-5, 3), thereby causing the company further reputational damage. Therefore, the mere existence of an action in civil liability (and the prospect of the related penalties) could encourage companies to implement their vigilance plan in order to monitor and control their risks.

Therefore, the threat over the application of such penalties could be effective on two fronts. The first reason is that the Law entrusts "new judges" – the media, social networks and civil society – with the power to request periodic penalty payments, report on failures to comply and share such reports. The second reason is inherent in the legal, financial and reputational risks the company runs if it actually incurs these penalties. Companies should therefore be highly incentivised to establish a vigilance plan and document its effective implementation along with other stakeholders, as suggested in the Law itself (C. com., art. L. 225-102-4, I²⁸). Thus, penalties fulfil a preventive goal that resonates with the underlying philosophy of the Law.

B. - Prevention as the Underlying Philosophy of the Law

The preventive goal of penalties is in line with the general objective of prevention as set in the Law. Indeed, the Law introduces what could be called an ex-ante liability that serves as the foundation for the Vigilance Obligations.²⁹ In establishing a vigilance plan, companies must be able to "identify the risks and [...] prevent serious infringements of human rights and fundamental freedoms [...]" (C. com., art. L. 225-102-4, I). Professor Nicolas Cuzacq confirms that "the goal of the vigilance plan is to prevent harm from occurring [...], with the right to remediation as a solution of last resort."³⁰ Furthermore, the requirement that implementation of the vigilance plan must be effective ensures that prevention is operational, thereby avoiding a situation where plans are established merely for declarative purposes. Finally, publishing a plan, reporting on its effective implementation, and including the plan and related report in the annual management report reduces information asymmetries between companies and stakeholders. Shareholders, individuals and actors from civil society thereby have access to better information on how the company is meeting its Vigilance Obligations, which creates even more effective external monitoring. Such external monitoring may be all the more effective when combined with periodic penalty payments that any parties with standing may seek.

28 "The plan is meant to be designed together with company stakeholders, if so through multi-party initiatives within sectors, or territorial level."

29 N. Cuzacq, « Le devoir de vigilance des sociétés mères et des donneurs d'ordre », op. cit., esp. p. 455 to 458.

30 N. Cuzacq, « Le devoir de vigilance des sociétés mères et des donneurs d'ordre », op. cit., esp. p. 455.

The vigilance plan, as the backbone of the Vigilance Obligations, is also quite distinct from remediation. Plans do not have to include remedies to be put into action once human rights abuses have already occurred. By contrast, according to the provisions on corporate responsibility in the Guiding Principles, companies should respect human rights by having appropriate processes in place to prevent and also address the adverse impacts they may have on such rights.³¹ The now-rejected civil fine also reflected this focus on prevention. The logic of remediation would have dictated a fine that was paid to a compensatory fund related to the type of damage incurred, rather than to the Public Treasury. A fine operating in the similar manner was actually proposed in the most recent preliminary draft reform of French civil liability.³²

It appears that in line with the overall philosophy of the Law, the penalties it contains will be more effective in preventing abuses than in offering an actual remedy for any abuses that do occur. Yet this observation should not be taken to detract from the Law's merits – pre-

ventive action is essential to raising company awareness, limiting the negative impact of their activities on human rights and thus reducing the number of potential victims of such impacts.

The Vigilance Obligations could lead to the emergence of a “new standard of behaviour”³³ on the part of companies included in the scope of the Law. If so, the penalties provided in the Law would ensure compliance with a standard that is firmly rooted in the Law and focused on prevention. Further, this standard might even reach a larger number of companies than those subject to the Law, as other such companies could also have an interest in taking a preventive approach in their own operations. In the meantime, remediation for victims will certainly be a key objective over the next few years as work on the Guiding Principles³⁴ and the French National Action Plan continues.³⁵

31 On remediation see esp. UN, CHR, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, op. cit., principles 11 and 22.

32 French Ministry of Justice, Draft reform of civil liability law, March 2017, article 1266-1 (establishing, for non-contractual matters, a non-insurable fine for undue profit earned from wrongful acts, to be paid either to the Public Treasury or to a compensatory fund related to the type of damage suffered, rather than punitive damages intended for the victim.).

33 E. Daoud & S. Sfoggia, « Entre fantasme et réalité : le rôle de l'avocat en matière de mise en conformité des entreprises avec la loi sur le devoir de vigilance », *D. Avocats. Exercer et Entreprendre*, 2017, p. 99, esp. p 101.

34 United Nations, Working Group on the issue of human rights and transnational corporations and other business enterprises, Outcome of the fifteenth session of the Working Group on the issue of human rights and transnational corporations and other business enterprises, 26-30 Sept. 2016, § 6, 10, 15 and 18.

35 French Ministry of Foreign Affairs and International Development, *Plan national d'action pour la mise en œuvre des principes directeurs des Nations unies relatifs aux droits de l'Homme et aux entreprises*, op. cit.