

## DUTY OF VIGILANCE

# 92 Scope of the Law on the Corporate Duty of Vigilance Companies Subject to the Vigilance Obligations



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**T**he first months following the adoption of the law on the corporate duty of vigilance of parent companies and instructing companies (the "Law") led to a number of questions regarding which companies must 1) establish a vigilance plan, 2) effectively implement it and 3) make this plan public, along with a report on its effective implementation, and include both in the company's annual management report (the "Vigilance Obligations"). The entities that fall within the scope of the Law (the "Relevant Undertakings") are the ones subject to the Vigilance Obligations and, *inter alia*, required to establish a vigilance plan. These companies must be distinguished from the other, more numerous, entities which are included within the scope of the vigilance plan of the Relevant Undertakings subject to the Vigilance Obligations, this scope being considered later<sup>1</sup>.

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The first questions on the Relevant Undertakings subject to the Vigilance Obligations have already been clarified. Two main questions, however, remain. First, whether SAS [*Sociétés par Actions Simplifiées*] are included in the corporate forms targeted by the Law, a question that resurfaced after the transposition of the directive on the disclosure of non-financial information.<sup>2</sup> Second, what control relationships are taken into account in determining the scope of the Law (1). The Law also provides that certain Relevant Undertakings subject to the Vigilance Obligations that are within groups of companies are deemed to satisfy the Vigilance Obligations pursuant

to an exemption mechanism. This mechanism also raises several questions that, to date, have rarely been addressed (2).

We recall that the Law is part of a nascent approach which aims to make reporting steps more effective with respect to human rights and fundamental freedoms, health and safety of persons [in French, *personnes* – also understood in English as "individuals"] and the environment, while limiting these to a relatively restricted number of companies<sup>3</sup>. The scope of the Law would therefore only include

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1 See this issue, dossier 93.

2 EP et EU Council, dir. 2014/95/UE, 22 Oct. 2014 amending directive 2013/34/UE as regards disclosure of non-financial information: JOUE (Journal Officiel de l'Union Européen – Official Journal of the European Union) n° L 330, 15 Nov. 2014, p. 1.

3 See this issue, dossier 95. – See S. Brabant and E. Savourey, *A Closer Look at the Penalties Faced by Companies* [Loi relative au devoir de vigilance: des sanctions pour prévenir et réparer?]: See Rev. Int. Compliance 2017, p. 24 [English translation also available on the BHRRRC website]. – See also A. Danis-Fantôme and G. Viney, *La responsabilité civile dans la loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*: Recueil Dalloz, n° 28, 3 August 2017, p. 1610 (on sanctions and specifically the implementation of civil liability under the Law on the duty of vigilance as a preventative measure).

between 150 and 200 companies (but with whom numerous commercial partners operate)<sup>4</sup>. This restrictive scope contrasts with the alternative choice of a less coercive approach, the scope of which could have involved either a larger number of economic actors, based on the same model as the directive on the disclosure of non-financial information<sup>5</sup>, or all business enterprises, based on the model of the United Nations Guiding Principles on Business and Human Rights ("Guiding Principles")<sup>6</sup>.

## 1. Companies Bound by Vigilance Obligations

Pursuant to the provisions of article L. 225-102-4, I of the French Commercial Code [*Code de commerce*], "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, shall establish and implement a vigilance plan in an effective manner".

The methodology of the Law involves determining its scope of application for "any company" that satisfies the criteria the Law sets. In a group of companies [i.e. corporate group] it is key, first, to determine whether each company, taken individually, satisfies these criteria. Then, determine if "duplicates" in the companies entering into the scope of the Law, in a same group of companies, can be eliminated using the exemption mechanism.

According to article L. 225-102-4, I of the Commercial Code, for a company to fall under the scope of the Law, it must satisfy several criteria. There must first be 1) a company whose corporate form falls within the scope of the Law. Then, it has to be determined whether, following two consecutive financial years, said company has, EITHER 2a) at least five thousand employees itself and in its direct or indirect subsidiaries whose registered office is located within French territory, OR 2b) at least ten thousand employees itself and in its direct or indirect subsidiaries whose registered office is located within French territory or abroad.

Each criterion, namely the location of the registered office (A), the corporate form required to fall within the scope of the Law (B), the nature of the shareholdings (C) and the number of employees (D) requires further analysis, particularly given the letter of the Law has

sometimes caused difficulties of interpretation.

### A. - The Location of the Registered Office of Companies Falling within the Scope of the Law

The jurisdiction in which the registered office of the company falling within the scope of the Law must be located now seems to have been clarified despite the lack of precision of the Law. Indeed, given the wording of the Law, it was unclear if the expressions "whose registered office is located within French territory" and "whose registered office is located within French territory or abroad" applied to the company or its subsidiary. The French Constitutional Court [*Conseil constitutionnel*] by way of reformulation, gave its interpretation of the Law. It held that these two expressions apply to the subsidiaries, while the parent companies are incorporated under French law<sup>7</sup>. This view, which was shared by the Government<sup>8</sup>, confirms the analyses of most commentators on the Law who had previously considered this question<sup>9</sup>. It should also be emphasised that it does not matter if "the parent company itself is a subsidiary of a foreign parent company or controlled by one"<sup>10</sup>; provided the company is French and satisfies the conditions of the corporate form and the employee threshold, it will be bound by the Vigilance Obligations, even in the case of companies that are the French subsidiaries of foreign groups<sup>11</sup>.

Therefore, the companies that should be taken into account in determining the scope of the Law are, on the one hand, companies registered in France with at least 5,000 employees within the company itself and in its subsidiaries, but only those subsidiaries whose registered office is in France, or, on the other hand, companies registered in France which have at least 10,000 employees, including within their subsidiaries whose registered offices are abroad.

Furthermore, the company based in France must have one of the corporate forms covered by the Law. This company must also precisely identify the companies that form part of its group, both

4 AN (Assemblée Nationale – French National Assembly), full minutes of the session on Monday 30 March 2015, p. 3247 (Philippe Noguès remarks that the intended thresholds "affect between 150 and 200 companies, which will cover close to 50% of the export business").

5 In this regard, See Sénat, rep. n° 10, 5 Oct. 2016, spec. p. 16 and 17.

6 In this regard, See S. Brabant, *Devoir de vigilance : une proposition de Loi (pas vraiment) raisonnable*: Le Monde, 17 Jan. 2017. - See also C. Hannoun, *Le devoir de vigilance des sociétés mères et entreprises donneuses d'ordre après la loi du 27 mars 2017*: Dalloz soc. 2017, p. 806 ("The legislator should therefore work to implement a system suitable for smaller companies").

7 Const. court, Dec. 23 March 2017, n° 2017-750 DC, § 3 ("Under paragraph I, companies whose registered office is located in France and which, at the closure of two consecutive financial years, employ at least five thousand employees themselves and in their French subsidiaries, or employ at least ten thousand employees themselves and in their French and foreign subsidiaries, are bound by the obligation to establish a vigilance plan").

8 Observations of the Government on the Law on the duty of vigilance of parent companies and instructing companies: JO (Journal Officiel – French Official Journal) 28 March 2017, text n° 5.

9 See S. Schiller, *Exégèse de la loi relative au devoir de vigilance des sociétés mères et entreprises donneuses d'ordre*: JCP E 2017, 1193, § 3, p. 21 (establishing a parallel with Law n° 2013-504 of 14 June 2013 on securing employment and the government report stipulating it). - A. Reygrobellet, *Devoir de vigilance ou risque d'insomnies?*: Rev. Lamy dr. aff. July. 2017, spec. § 9, p. 37 (considering that French law cannot prescribe obligations for specific performance [obligations de faire] for a foreign company and therefore have an extraterritorial scope).

10 A. Reygrobellet, *Devoir de vigilance ou risque d'insomnies?*, prec., spec. § 8, p. 37.

11 Observations of the Government on the Law on the duty of vigilance of parent companies and instructing companies, prec.

in France and abroad, and establish a record of the number of employees.

## B. - The Corporate Form of Companies within the Scope of the Law

### 1. The Inclusion of SAs [*Sociétés Anonyme*], SCAs [*Sociétés en Commandite par Actions*], SEs [*Sociétés Européennes*]

Whilst the Law does not specify the corporate form of companies that fall within its scope of application, this can be deduced based on the position of the Law's provisions in the Commercial Code. Inserted in chapter V of title II of Book II of the Commercial Code on SAs (Comm. Code, art. L. 225-101- 4 and L. 225-102-5), the new articles introduced by the Law therefore apply, without any ambiguity, to companies with the SA form [*société anonyme*].

Furthermore, looking at the cross-references in the Commercial Code, there is no doubt that these articles also apply to SCAs (Comm. Code, art. L. 226- 1, para. 2)<sup>12</sup> and, according to our interpretation, to European Companies (SE) (Comm. Code, art. L. 229-1 and L. 229-8)<sup>13</sup>.

### 2. The Debate on SASs [*Sociétés par Actions Simplifiées*]

The inclusion of SASs in the scope of the Law remains subject to debate. Whilst the majority of legal commentators are in favour of the application of the Law to SASs, a minority have expressed an opposing view<sup>14</sup>. The order for the transposition of the directive on the disclosure of non-financial information [*ordonnance de transposition*] dated 19 July 2017<sup>15</sup> and its implementing decree of 9 August 2017<sup>16</sup>, could also support both points of view.

#### a) Arguments in Favour of the Exclusion of SASs from the Scope of the Law

Those who support the exclusion of SASs mainly base their views on references contained in the Law itself, specifically the reference

to article L. 225-102, in two respects. Firstly, the Law requires the publication of the vigilance plan and the report on its effective implementation, and the inclusion of both in the report mentioned in article L. 225-102<sup>17</sup>. However, this article covers the publication of SAs' management reports and excludes SASs from its application (given it is part of the "negative referral" [*renvoi négatif*] under article L. 227-1, paragraph 3)<sup>18</sup>. Therefore, according to this interpretation, since SASs cannot prepare and publish these management reports, the duty of vigilance would not apply to them.

Another argument is based on the drafting of the transitional provisions [*dispositions transitoires*] for the Law. According to article 4 of the Law, the Law enters into force "with the report, mentioned in article L. 225- 102 of the same Code, covering the first financial year commencing after the publication of this law". The argument is similar: since SASs are not required to prepare the report mentioned in article L. 225-102, the legislation does not enter into force for them<sup>19</sup>. The legal committee of the ANSA [*Association Nationale des Sociétés par Actions* – French National Agency of Joint-Stock Companies] agrees with this position and states: "the provision on the entry into force of the new system, which makes the application of the new law conditional upon the drafting of the report mentioned in article L. 225-102, has the effect of excluding SASs from the scope of the new obligation, with regard to the establishment of a vigilance plan"<sup>20</sup>.

It is true that the desire to exclude SASs from the scope of the Law appeared at the start of the parliamentary debates, specifically in

12 See S. Schiller, *Exégèse de la loi sur le devoir de vigilance et entreprises donneuses d'ordre*, *prec.*, spec. § 3, p. 20. - A. Reygrobellet, *Devoir de vigilance ou risque d'insomnies?*, *prec.*, spec. § 10, p. 38. - J. Heinrich, *Société anonyme (SA) - Devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre : une loi finalement adoptée, mais amputée*: Dr. sociétés 2017, comm. 78, spec. p. 30.

13 See S. Brabant and E. Savourey, *A Closer Look at the Penalties Faced by Companies*, *prec.*, p. 22. - And also confirmed by A. Reygrobellet, *Devoir de vigilance ou risque d'insomnies?*, *prec.*, spec. § 10, p. 38. - C. Hannoun, *Le devoir de vigilance des sociétés mères et entreprises donneuses d'ordre après la loi du 27 mars 2017*, *prec.*, spec. p. 811.

14 For another summary of this debate, See C. Hannoun, *Le devoir de vigilance des sociétés mères et entreprises donneuses d'ordre après la loi du 27 mars 2017*, *prec.*, spec. p. 811-812.

15 Ord. n° 2017-1180, 19 July 2017 on the disclosure of non-financial information by certain large undertakings and groups: JO 21 July 2017, text n° 13.

16 D. n° 2017-1265, 9 August 2017 for application of order n° 2017- 1180 of 19 July 2017 on the disclosure of non-financial information by certain large undertakings and groups: JO 11 August 2017, text n° 25.

17 See A. Reygrobellet, *Devoir de vigilance ou risque d'insomnies?*, *prec.*, spec. § 12, p. 38.

18 Indeed, articles L. 225-102-4 and L. 225-102-5 are not part of the "negative referral" [*renvoi négatif*] of article L. 227-1, paragraph 3 which had been amended by Law n° 2014-1662 of 30 December 2014 including various provisions adapting European Union legislation on Economic and Tax matters.

19 See A. Reygrobellet, *Devoir de vigilance ou risque d'insomnies?*, *prec.*, spec. § 12, p. 38. - See also *Un plan de vigilance imposé aux sociétés employant au moins 5 000 salariés*: ed. F. Lefebvre, 5 Apr. 2017. - *Contra*, see C. Hannoun, *Le devoir de vigilance des sociétés mères et entreprises donneuses d'ordre après la loi du 27 mars 2017*, *prec.*, spec. p. 811 (see *infra*).

20 ANSA, *Champ d'application de la loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre: les SAS sont-elles tenues de mettre en place un tel plan de vigilance ?*: Legal committee, n° 17-028, 3 May 2017.

21 See AN, *rep. n° 2628*, p. 64 ("Article 1 applies in a restricted scope due to its inclusion in a chapter of the French Commercial Code which brings together the provisions specifically applicable to *sociétés anonymes*. Its provisions will therefore not concern *sociétés par actions simplifiées*, *établissements publics* or any other legal form which a company is likely to take"). - See also AN, *rep. n° 2628*, p. 82 and 83 (on the rejection of amendment CL28 aiming to include the SAS). - See also AN, *Commission on sustainable development and land use planning*, *minutes n° 34*, 11 March 2015, spec. p. 17 (on the rejection of amendment CD20 by the Commission on Sustainable Development because "obligations of disclosure of extra-financial information, which constitute the common thread of this proposal to put in place a vigilance plan, do not yet affect SASs. The difference in treatment does not have the same scope. The obligation to draw up and effectively implement a vigilance plan makes sense for operating companies which, in general, are not SASs, whose form is more suited, for example, to holding companies. On the contrary, the SAS status will not prevent the court from going back to the ultimate holding company when liability for breach of the obligation may be implemented"). - See also AN, *full minutes*, session of Monday 30 March 2015, p. 3262 and 3263 (on the rejection of amendment n° 42 aiming to include SASs).



2015 when the legislator wanted to target only SASs<sup>21</sup>. The question remains, however, whether the consequences of existing referrals to the Commercial Code had been properly measured by the legislator at that time.

Finally, the order transposing the directive on the disclosure of non-financial information [*ordonnance de transposition*] could reinforce arguments which seek to exclude SASs from the scope of the Law<sup>22</sup>. We recall that the order, in line with the directive, targets the communication by certain companies of non-financial information via an extra-financial performance statement [*déclaration de performance extra-financière*] in their management report (on the scope of companies bound by this obligation, See Comm. Code, art. L. 225-102-1, I, as amended by order n° 2017-1180 of 19 July 2017<sup>23</sup>)<sup>24</sup>. This information covers several themes, including the social and environmental consequences of a company's activities. For a more limited number of companies, whose shares are traded on a regulated market<sup>25</sup>, this information must also cover the effects of this activity with regard to human rights and anti-corruption (Comm. Code., art. L. 225-102-1, III).

However, the order clearly excludes SASs from its scope, apart from some exceptions. This means that SASs are not required to publish extra-financial information<sup>26</sup>. Wouldn't it be tempting to deduce that the SAS should generally remain outside the scope of any form of non-financial reporting? Indeed, if SASs are not subject to the general non-financial reporting obligation, would it be coherent for them to be subject to more specific obligations of vigilance on non-financial themes such as human rights and fundamental freedoms, health and safety of persons and the environment as provided for in the Law?

Nevertheless, the inclusion of SASs in the scope of the Law has also been subject to compelling arguments advanced by the majority of legal commentators.

22 See B. Parance, *La déclaration de performance extra-financière, nouvelle ambition du reporting extra-financier - À propos de l'ordonnance du 19 juillet 2017 de transposition de la directive Barnier du 22 octobre 2014*: JCP G 2017, 1150. - J. Heinrich, *Obligations d'information des sociétés : les ordonnances de l'été*: Dr. sociétés 2017, comm. 163 (on the exclusion of SASs from extra-financial reporting obligations).

23 "I. – An extra-financial performance statement is inserted into the management report provided in paragraph two of article L. 225-100, when the balance sheet total or net turnover and the number of employees exceed thresholds set by a decree of the Conseil d'État [of 9 August 2017 amending article R. 225-104 of the French Commercial Code. The thresholds being assessed at the date of closure of the financial year]: 1° For any company whose shares are traded on a regulated market [20 million euros for the balance sheet total, 40 million euros for the net turnover and 500 for the average number of permanent employees during the financial year]; 2° For any company whose shares are not traded on a regulated market [100 million euros for the balance sheet total, 100 million euros for net turnover and 500 for the average number of permanent staff employed during the financial year]".

24 Medef, *Guide Méthodologique Reporting RSE, déclaration de performance extra-financière, les nouvelles dispositions légales et réglementaires*, Sept. 2017 (on a general presentation of extra-financial reporting and comparisons between the order, the loi Sapin 2 and the Law).

25 Referred to in 1° of article L. 225-102-1 of the French Commercial Code.

26 The discussions surrounding its transposition [*travaux de transposition*] had initially considered including them, See Min. de l'Économie et des finances, *Projet d'ordonnance portant transposition de la directive 2014/95/UE*: <https://www.tresor.economie.gouv.fr/Ressources/File/433034>

## b) Arguments in Favour of the Inclusion of SASs in the Scope of the Law

We recall that the majority of legal commentators, as expressed after the publication of the Law<sup>27</sup>, and the Government<sup>28</sup>, consider that SASs fall within the scope of the Law. Firstly, the Vigilance Obligations introduced by the Law, under articles L. 225-102-4 and L. 225-102-5, are not part of the negative referrals under article L. 227-1. This would mean that these articles do apply to the SAS. As emphasised by Michel Germain and Pierre-Louis Perrin, the insertion of articles between L. 225-102-3 and L. 225-103 renders them automatically applicable to SASs<sup>29</sup>. If SASs are to be excluded, should this not be achieved by amending article L. 227-1 in order to ensure that the provisions of the new articles L. 225-102-4 and L. 225-102-5 are not applicable to SASs, rather than by the effect of transitional provisions which are largely open to interpretation? One author even noted that article 4 of the Law could also be interpreted as making the Vigilance Obligations immediately applicable to SASs<sup>30</sup>.

Whilst the reference to article L. 225-102 of the Commercial Code seems to raise a genuine question of theoretical coherence in relation to the vigilance plan in the management report, it should not be forgotten that in practice, SASs also draft a management report required by the Commercial Code<sup>31</sup>. The distinction between the management reports of articles L. 225-102 and L. 232-1 of the Commercial Code relates more to their substance and the strengthened obligations which apply to SAs, rather than to the material document itself. Furthermore, the Constitutional Court appears to have interpreted the mention of article L. 225-102 as a wider reference to the management report. When considering the transitional provisions' compliance with the constitutional objective of accessibility and intelligibility of the law, the Constitutional Court specified that: "[t]he provisions [of the rest of article L. 225-102-4 and of L. 225-102-5] will be applicable as of the annual management report covering the first financial year commencing after the publication of the law"<sup>32</sup>.

We emphasise that if the transposition of the directive on the disclosure of non-financial information by the order of 19 July 2017

27 On the inclusion of SASs, See S. Schiller, *Exégèse de la loi sur le devoir de vigilance et entreprises donneuses d'ordre*, prec., spec. p. 20. - C. Malecki, *Le devoir de vigilance des sociétés mères et entreprises donneuses d'ordre: était-ce bien raisonnable?*: Bull. Joly Sociétés 2017, p. 298. - P.-L. Périn, *Devoir de vigilance et responsabilité illimitée des entreprises: qui trop embrasse mal étreint*: RTD com. 2015, p. 215, spec. p. 218 (concerning the draft law n° 2578 of 11 February 2015). - C. Hannoun, *Le devoir de vigilance des sociétés mères et entreprises donneuses d'ordre après la loi du 27 mars 2017*, prec., spec. p. 811-812.

28 *Observations of the Government on the law on the duty of vigilance of parent companies and instructing companies*, prec. ("These obligations will apply to sociétés anonymes as well as sociétés en commandites par actions and sociétés par actions simplifiée, pursuant to references provided in articles L. 226-1 and L. 227-1 of the French Commercial Code").

29 M. Germain and P.-L. Perin, *SAS - La société par actions simplifiée - Études - Formules*: Joly éd., Pratique des affaires, July. 2016, § 109-1.

30 C. Hannoun, *Le devoir de vigilance des sociétés mères et entreprises donneuses d'ordre après la loi du 27 mars 2017*, prec., p. 812.

31 Under article L. 232-1 of the Commercial Code.

32 See Const. coun. Dec. 23 March 2017, prec., § 31 (our emphasis).

provides a general exclusion of SASs from the scope of non-financial reporting, it also envisages some exceptions directly or indirectly affecting SASs. This is the case for SNCs [*Sociétés en Nom Collectif*] whose shares are held by, *inter alia*, SASs<sup>33</sup>. The exception also applies to some credit institutions and to financing companies, investment companies, parent companies of financing companies and financial holding companies whose shares are traded on regulated markets, when these entities have, *inter alia*, the SAS form and, provided that the balance sheet total or net turnover and number of employees exceed certain thresholds<sup>34</sup>. The management report provided for in article L. 225-100-1, I and the extra-financial performance statement provided for in article L. 225-102-1 apply to these SNCs and these SASs. Should the order therefore be held as the first challenge to the principle of non-applicability of non-financial reporting obligations to SASs?<sup>35</sup> Should we consider that SASs, required to draft an extra-financial performance statement, may also be subject to the Vigilance Obligations such that this signals the start of a legislative evolution? Lastly, should we not consider that precisely because the order excludes most of the SASs from non-financial reporting, it would thus be even more important that SASs be subject to the Law in order to ensure the respect of human rights and fundamental freedoms, health and safety of persons and the environment? Corporate law is certainly experiencing a general movement in this direction.

### c) Beyond the Debate: the Guiding Principles as a Compass for Interpretation

There are various positions, regarding the inclusion or exclusion of SASs in the scope of the Law, that are in conflict. These different positions may arise, in part, as a result of their proponents defending

a point of view which reflects their own interests. Such a situation could lead to an intractable debate and, unless there is legislative clarification beforehand, it will be up to the courts to decide. In these circumstances, to clarify the debate and anticipate possible interpretations, the Law needs to be placed into its broader context.

The Law adopts a restrictive approach of companies bound by the Vigilance Obligations compared to the Guiding Principles. Nevertheless, it should be remembered that the Law is expressly based on the Guiding Principles that are the foundation of the business and human rights movement.<sup>36</sup> The Guiding Principles rely on a broader interpretation of the companies bound by a duty to respect human rights. These principles could then serve, alongside the OECD Guidelines for Multinational Enterprises, as a "compass" for the court in interpreting the Law.<sup>37</sup>

Therefore, the Guiding Principles require that all "business enterprises", according to their terminology, respect human rights<sup>38</sup> in their activities and value chains<sup>39</sup>. These entities are "all enterprises regardless of their size, sector, operational context, ownership and structure"<sup>40</sup>. The Guiding Principles are indeed widely recognised by companies. Furthermore, as emphasised by the Guiding Principles, it is key that companies should "know and show that they respect human rights" and that they implement policies and processes for this purpose, including processes of human rights due diligence. These processes are adjustable depending on the size of the company<sup>41</sup>.

33 For SNCs [*sociétés en nom collectif*], See ord. n° 2017-1180, 19 July 2017, *prec.*, art. 2 ("Part I of article L. 225-100-1 and article L. 225-102-1 apply to the management report when all of the shares are held by persons with the following forms or by foreign companies with a comparable legal form: *société anonyme*, *société en commandite par actions*, *société à responsabilité limitée* or *société par actions simplifiée*").

34 See ord. n° 2017-1180, 19 July 2017, *prec.*, art. 5 ("Article L. 225-102-1 of the Commercial Code is applicable, in the conditions provided for the companies listed in 1° of its I, to *établissements de crédit* with the corporate form of *société anonyme*, *société en commandite par actions*, *société à responsabilité limitée* or *société par actions simplifiée* as well as financing companies [*sociétés de financement*], investment companies [*entreprises d'investissement*], parent companies of financial companies [*entreprises mères de sociétés de financement*] and financial holding companies [*sociétés financières holding*] with one of these company forms and whose shares are traded on a regulated market, when the total of their balance sheet or net turnover and their number of employees exceed, where applicable on a consolidated basis, the thresholds provided for the companies mentioned above in 1° of I of the same article").

35 See also C. Malecki, *Transposition de la directive RSE: un nouveau cadre de publications extra-financières pour les grandes entreprises*: Bull. Joly Sociétés 2017, p. 633 (expressing a view in favour of non-financial reporting for SASs when they exceed the thresholds set out in the decree of 9 August 2017: "[h]owever, if they exceed the thresholds specified by the decree of 9 August 2017 for unlisted companies, it would seem logical to require from them to disclose such a statement inasmuch as article L. 225-102-1, 2° generally refers to "any company" and spec. p. 633: "[g]enerally, it would seem rather un-virtuous that SASs, which exceed, for example, significant thresholds in terms of employees and turnover, would not take into account the social, environmental and societal consequences of their activities").

36 AN, *prop. of law n° 2578, spec. p. 4* (explanatory memorandum of the draft law) ("In accordance with the United Nations Guiding Principles on Business and Human Rights unanimously adopted by the United Nations Council on Human Rights in June 2011, and in accordance with the OECD Guidelines on Multinational Enterprises, the purpose of this draft law is to introduce vigilance obligations for parent companies and instructing companies with respect to their subsidiaries, sub-contractors and suppliers"). - See this issue, dossier 91.

37 C. Hammoun, *Le devoir de vigilance des sociétés mères et entreprises donneuses d'ordre après la loi du 27 mars 2017, prec., spec. p. 812*. (mentioning that the OECD Guidelines for Multinational Enterprises target "enterprises" in a broader sense, independently of their corporate form. Arguing therefore that, in order to reflect the objectives of the Guidelines, the SAS should fall within the scope of the Law).

38 With regard to the French version on this article, it should be noted that the United Nations, in their official translations, use the term "*droits de l'homme*" (without capitals) whilst the Law uses the term "*droits humains*". The two expressions therefore coexist in the original version in French of this article.

39 With regard to the wide scope of application of the Guiding Principles, See UN, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, *prec.*, 2011, *spec. principle 14* ("The responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure. Nevertheless, the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprise's adverse human rights impacts.").

40 See UN, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, *prec.*, *spec. general principles and principle 14*.

41 See UN, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, *prec.*, *spec. p. 18, principle 15* ("In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances [...]") and *comm. under principle 15*.

In line with the spirit of the Guiding Principles and faced with the uncertainty around the inclusion of SASs into the scope of the Law, it would probably be prudent, at the very least, to adopt a more inclusive, rather than exclusive, vision of companies subject to Vigilance Obligations. This would help anticipate the consequences of a jurisprudential or legislative confirmation that the scope of the law extends to SASs. If, however, jurisdictions were to consider that the law does not apply to SASs, then this voluntary compliance with the Vigilance Obligations would, in any event, allow SASs to use the Law as a tool to comply with the Guiding Principles. Such compliance would help them control the risk of adverse impacts on human rights in their activities and value chains. This compliance could also generate new opportunities. First, compliance could attract new employees, investors and consumers. Second, compliance could mean a potential access to new markets for which extra-financial performance is a differentiating, and even decisive, criterion<sup>42</sup>. Similarly, numerous SASs may have to comply with the human rights requirements of some of their partners, including, for example, financial institutions.

## C. - The Identification of "Subsidiaries"

The first step in determining whether a company falls within the scope of the Law, and is therefore a Relevant Undertaking subject to the Vigilance Obligations, is to identify its corporate form. The second step is to identify its "direct and indirect subsidiaries". This identification of subsidiaries is therefore an essential prerequisite in counting employees. In the absence of a clarification of the Law, does this mean that the definition of a "subsidiary" under article L. 233-1 of the Commercial Code should be applied? Under this article, a subsidiary is a company in which over half of the company capital is held by another company. The National Assembly's preparatory work<sup>43</sup> [*travaux préparatoires*] and the distinctions introduced by the Law, that refer to articles of the Commercial Code related to control, appear to be in favour of a positive response to this question<sup>44</sup>.

Some authors, however, consider that the notion of control is the one which should be taken into account in determining the scope of the Law. One of the arguments in favour of this position is the parallel that can be drawn with companies exempt from Vigilance Obligations which are "subsidiaries or companies controlled" by "the company which controls them, under article L. 233-3" (Comm.

Code, art. L. 225-102-4, I, para. 2)<sup>45</sup>. It is true that restricting the scope of the Law to the subsidiaries mentioned in article L. 233-1 seems reductive, especially since this article is not referred to<sup>46</sup>. Given the lack of precision of the Law, could international sources bring clarification? The OECD Guidelines encourage an extensive interpretation of the notion of control and, as one author notes, "in the widest possible manner, at least within the meaning of article L. 233-3 of the Commercial Code which is usually used, in order to satisfy the objectives of the legislation"<sup>47</sup>. The Guiding Principles also adopt this approach<sup>48</sup>.

In the absence of a clear indication in the Law, the definition of the link between the company and its subsidiary, ultimately in order to calculate the number of employees, should be treated with significant caution by companies falling under the scope of the Law. To date, the range of possible interpretations extends from a restrictive, literal reading of the Law to a wide interpretation of the Law, inspired by international principles<sup>49</sup>. Assuming this issue is resolved, the company must not lose sight of the process it must follow to prepare a consolidated record of its employees.

## D. - Calculation of the Number of Employees

The Law has chosen an approach based on a threshold of the number of employees. This approach contrasts with the Modern Slavery Act, for instance, which applies a turnover threshold<sup>50</sup>. These thresholds also differ from those in contemporary French legislation: namely the directive on the disclosure of non-financial information, its transposing order of 19 July 2017 and Law n° 2016-1691 of 9 December 2016 on transparency, anti-corruption and the modernisation of economic life, also known as the law Sapin 2 [*loi Sapin 2*], which combine both the turnover and the number of employees<sup>51</sup>. However, the thresholds implemented by

<sup>42</sup> See this issue, dossier 91.

<sup>43</sup> AN, rep. n° 2628, 11 March 2015, spec. p. 64 (defining the subsidiary by citing article L. 233-1 of the Commercial Code: "The definition of a subsidiary is set out in article L. 233-1 of the Commercial Code. According to this provision, "when a company owns more than half of the capital of another company, the second company is considered (...) to be a subsidiary of the first company").

<sup>44</sup> Note that this situation contrasts with law Sapin 2 which relies on the notion of a group of companies to limit its scope. The reference to a "group of companies" in article 17, I of law Sapin 2 should indeed be interpreted as a reference to the combination formed by a parent company and its subsidiaries under article L. 233-1 of all the companies which it controls under article L. 233-3 of the Commercial Code according to the Constitutional Court (See *Const. Coun.*, Dec. 8 Dec. 2016, n° 2016-741 DC, spec. § 14).

<sup>45</sup> See also the second part of this contribution on exemptions. - See also A. Reygrobellet, *Devoir de vigilance ou risque d'insomnies?*, prec., spec. § 7, p. 37.

<sup>46</sup> We note in this respect that article L. 233-1 of the Commercial Code expressly provides that it is only applicable to sections II and IV of chapter III of title III of book II of the Commercial Code.

<sup>47</sup> See C. Hannoun, *Le devoir de vigilance des sociétés mères et entreprises donneuses d'ordre après la loi du 27 mars 2017*, prec., spec. p. 813.

<sup>48</sup> See spec., UN, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, prec., principle 14 (relating to the notion of a company: "regardless of their [...] ownership and structure").

<sup>49</sup> In the same way we had for the SAS.

<sup>50</sup> Modern Slavery Act 2015 (UK), c. 30, § 54. - The Modern Slavery Act 2015 (Transparency in supply chains) Regulations 2015 No. 1833: 28 Oct. 2015 ("The amount of total turnover prescribed for the purposes of section 54(2)(b) of the 2015 Act is £36 million.").

<sup>51</sup> It should be noted that the Senate sought to harmonise this with the thresholds found in the directive on non-financial reporting and consequently amended the draft law in its second reading, which was rejected by the National Assembly, see *Senate*, rep. n° 10, 5 Oct. 2016, spec. p. 16 and 17. - See article 17, I of law Sapin 2 ("Chairmen, CEOs, and managers of a company employing at least 500 employees, or belonging to a group of companies whose parent company has its registered office located within France and whose workforce includes at least 500 employees, and whose turnover or consolidated turnover is higher than 100 million, are required to take measures to prevent and detect commission of acts of corruption or influence-peddling in France, or abroad, in accordance with the conditions provided in paragraph II").



the Law recall those of the Law of 14 June 2013 related to securing employment [*loi relative à la sécurisation de l'emploi*] which provides that companies included in the scope of application of this law shall have directors [*administrateurs*] in place to represent employees<sup>52</sup>.

It is also worth noting that the Law requires calculating the number of "employees" [*salariés*] of a parent company and its subsidiaries at the end of two consecutive financial years. This identification of employees contrasts, for example, with the order of 19 July 2017 which refers to the threshold of "permanent staff employed during the financial year" (Comm. Code, art. R. 225-104<sup>53</sup>). In the absence of a provision in the Law on a method to calculate the 5,000 or 10,000 employees, it seems nonetheless possible to use the method found in the French Employment Code [*Code du travail*] (Emp. Code, art. L. 1111-2 and L. 1111-3), which is used to calculate a company's workforce. In any event, the wording "employees" seems to exclude certain forms of employment in particular people working for the company and its subsidiaries, in France and abroad, under a status other than salaried staff.

Below are some examples of calculations of the number of employees in hypothetical companies fulfilling the corporate form requirements. For instance, a French company with less than 4,000 employees in France, with no subsidiaries abroad, would not fall within the scope of the Law because it does not exceed 5,000 employees in France. If this same company also had subsidiaries abroad totalling 4,000 employees, it would not fall within the scope of the law because it does not exceed the threshold of 10,000 employees in France and abroad. A French company with 10 employees in France and 9,991 employees distributed in one or more subsidiaries abroad would fall within the scope of the Law since it has more than 10,000 employees in France and in its subsidiaries abroad. For a foreign company with a subsidiary in France which has more than 5,000 employees in France, the subsidiary would also fall within the scope of the Law.

Having identified the companies that fall within the scope of the Law, it is now possible to determine which of them may be exempted, under certain conditions, from the Vigilance Obligations.

## 2. Companies Exempt from Vigilance Obligations

Article L. 225-102-4, I, paragraph 2 of the Commercial Code provides that: "[s]ubsidiaries or controlled companies which exceed the thresholds set out in the first paragraph are deemed to satisfy the obligations provided in this article when the company

which controls them, within the meaning of article L. 233-3, establishes and implements a vigilance plan related to the activity of the company and all of the subsidiaries or companies which it controls".

The exemption mechanism is inspired by the law Sapin 2 and uses a similar wording<sup>54</sup>. This mechanism was proposed at a late stage in the drafting of the Law, first by the Senate and then by the National Assembly<sup>55</sup>. The exemption provides that subsidiaries and controlled companies are deemed to satisfy the Vigilance Obligations, even though they fall within the scope of the Law in addition to their parent company, assuming they satisfy the criteria that we analysed previously, i.e. in terms of the location of the registered office, the company form and the threshold of employees. To avoid duplication, these entities "are deemed to satisfy the obligations provided in this article when the company which controls them, within the meaning of article L. 233-3, establishes and implements a vigilance plan related to the activity of the company and all of the subsidiaries or companies which it controls" (Comm. Code, art. L. 225-102-4, I, para. 2).

As was the case in the definition of the scope of the law, the notion of subsidiary is not clearly defined<sup>56</sup>. It seems reasonable here to draw inspiration from the exemption provided by law Sapin 2 which defines subsidiaries within the meaning of article L. 233-1. However, the "controlled companies", which are not mentioned in the determination of the scope of the Law, do appear in the scope of the exemptions. They are defined by reference to article L. 233-3 of the Commercial Code which includes various hypotheses of control, including joint control and presumption of control.

The question is therefore whether this exemption mechanism is mandatory or optional for subsidiaries and controlled companies. What happens if the parent company or its subsidiary wants the subsidiary to be bound by the Vigilance Obligations? The legislator's use of the words "are deemed" may seem to introduce a conclusive presumption [*présomption irrefragable*], as a result of the parent company complying with the Vigilance Obligations for its

54 L. n° 2016-1691, 9 Dec. 2016, prec., art. 17, I, 2 ("[w]hen the company produces consolidated accounts [*comptes consolidés*], the obligations defined in this article concern the company itself as well as all of its subsidiaries, within the meaning of article L. 233-1 of the Commercial Code, or companies which it controls, within the meaning of article L. 233-3 of the same code. The subsidiaries or controlled companies which exceed the thresholds set out in the aforementioned paragraph I are deemed to satisfy the obligations provided in this article, provided the company which controls them, within the meaning of the same article L. 233-3, implements the measures and procedures provided in paragraph II of this article and that these measures and procedures apply to all of the subsidiaries and companies which it controls"). We can note the symmetry between the companies entering into the scope of application of article 17 and those exempt in the anticorruption legislation. This parallel is not found in the Law, *See* in this respect, *supra*, part C.

55 The principle was proposed by the Senate Law Commission [*Commission des lois du Sénat*] in the amended draft law on 5 October 2016 before being taken up by the National Assembly in the same spirit, but using a different wording, on the basis of two amendments brought before it on 29 November 2016, *See Senate, prop. n° 11, 5 Oct. 2016. - See also, AN, full minutes, second session of Tuesday 29 November, spec. p. 8057-8058*, on amendments n° 17 and 22 adopted in this respect.

56 We note that contrary to the definition of the scope of the Law, the distinction between direct and indirect subsidiaries is no longer mentioned.

52 *See L. n° 2013-504, 14 June 2013 on securing employment: OJ 16 June 2013, text n° 1*. As also notes S. Schiller, *Exégèse de la loi sur le devoir de vigilance et entreprises domeuses d'ordre, prec., spec. p. 21*.

53 To determine the average number of permanent staff employed during the financial year, this article refers to article R. 123-200, paragraph 6 (decree n° 2017-1265 of 9 August 2017 implementing order n° 2017-1180 of 19 July 2017 on the disclosure of non-financial information by certain large undertakings and groups referring to article R. 225-104).

subsidiaries and controlled companies. This mechanism does not seem to be a flexible and adaptable tool and is likely to encourage the management/distribution of the responsibility within groups.

*De facto*, it appears preferable that the establishment of the plan, its effective implementation and its publication be centralised and that several entities in the same group do not work on the implementation of the same document, particularly given controlled companies - this time not in the capitalistic but rather the accounting sense<sup>57</sup> - fall within the scope of the vigilance plan to be drafted by the parent company. However, this exemption mechanism means that the parent company will have to address breaches of the Vigilance Obligations, not only in its activities, but also in those of its subsidiaries and controlled companies, where these fall within the ambit of the plan. Is the vigilance, required by the Law, more effective if it is higher in the corporate pyramid? In any event, in applying this exemption, it is essential that the parent company, when putting in place its vigilance plan, followed by its effective implementation, guarantees the implementation of procedures and indicators within the exempt companies. This will ensure the effective implementation of the plan.

It remains to be seen whether the vigilance plan, drafted by the parent company, must also include within its scope the entities which would normally have been included in the ambit of the vigilance plan that the subsidiary or controlled company would have to establish in the absence of the exemption mechanism. The Law provides that the controlling company must, within the framework of the exemption mechanism, "implement a vigilance plan relative to the activity of the company and all of the subsidiaries or companies which it controls" (Comm. Code, art. L. 225-102-4, I, para. 2). This wording could therefore limit the ambit of the plan and exclude companies which would have fallen within

the ambit of the plan that the subsidiary or controlled company should have drafted. However, looking at the ambit of the plan, it seems that a broader interpretation is possible. The ambit of the plan actually appears to cover the activities of controlled companies within the meaning of article L. 233-16, II, as well as subcontractors and suppliers of both the company and the controlled companies (Comm. Code, art. L. 225-102-4, I, para. 3, determining the ambit of the vigilance plan)<sup>58</sup>.

Finally, should we therefore understand that the parent company should only "establish and implement a vigilance plan related to the activity of the company and all of the subsidiaries or companies which it controls", such that the controlled company or subsidiary is deemed to satisfy the Vigilance Obligations? This would mean that the mere establishment and implementation of the plan would trigger the exemption, therefore enabling the subsidiaries and controlled companies to avoid liability for ineffective implementation. But, does this interpretation mean that to allow its subsidiaries and controlled companies to benefit from the exemption, the parent company is only required, *a minima*, to draft the plan and implement it, without monitoring or publishing the plan and its effectiveness? Such a situation would appear to be contrary to the philosophy of the Law which seeks the effective implementation of the plan.

Though it is increasingly possible to provide answers to questions concerning the scope of the Law, questions related to the definition of control and the exemption mechanism would benefit from further investigation from a corporate law standpoint and from jurisprudential clarifications. In the meantime, the implementation of the Law will most probably lead companies to take a position on the subject and contribute to practical clarifications of these questions and to any adjustments to be made to the Law.

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57 In accordance with article L. 233-16, II of the Commercial Code, *See this issue, dossier 93*.

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58 *See also this issue, dossier 93* (for a detailed analysis of this point)