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Duty of vigilance
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Law L. 2017-399, 27 March 2017 on Duty of vigilance

Article L 225-102-4 & 5 of the Commercial code

This new legislation was inspired by the tragedy of the Rana Plaza fire in Bangladesh where more than a thousand people died as a result of their forced working conditions. It created heavy obligations for companies and has already given rise to several legal actions initiated by militant NGOs, in particular by environmentalist organizations.

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As a pioneer in matters of compliance, France imposes an obligation of vigilance on companies employing more than 5,000 employees with head offices in the French territory (and for companies with head offices outside of France and that employ at least 10,000 employees). It applies to "parent companies and ordering companies". In practice, this translates into the mandatory implementation of a vigilance plan.

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This plan must include: "*reasonable vigilance measures to identify the risks and prevent serious violations of human rights and fundamental freedoms, health and safety of people and the environment resulting from the company's activities and companies it controls;*"

(This obligation also extends) "*to the activities of subcontractors or suppliers with respect to whom an established commercial relationship exists, when activities are attached to this relationship... This plan is "intended" to be drawn up together with the company's stakeholders*".

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More specifically, this plan must contain a cartography of risks and a "whistle blowing"-type alert system.

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The vigilance plan and full record of its effectiveness must be published in the management report presented by the board of directors during the annual general meeting.

If a company fails to meet these obligations, it may be ordered to do so ; in the event of default, the Judiciary court of Paris can be seized by any person with legal standing (NGOs, unions, various associations), who can then order the company to comply under financial compulsion.

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Failure to fulfill these obligations may lead to the company's liability and

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damages would have to be paid corresponding to the amount that the performance of the obligations would have made it possible to avoid.

After a legal controversy on jurisdiction, opposing companies (in particular Total and Casino who considered that only the commercial court has jurisdiction over matters regarding company management) to "prosecuting" NGOs (who argued that only the Judicial court has jurisdiction over questions on ecology and human rights), the legislator finally entrusted these actions to the jurisdiction of the Judiciary court of Paris (article L211-21 of the Code of Judicial Organization).

Many uncertainties however remain, rendering the applicability of this law "unclear" in practice.

Words it contains such as "reasonable" vigilance measures, the implementation of a plan with a "vocation" to be drawn up, "stakeholders", damages caused by the absence of a vigilance plan due to "serious harm" leave a significant amount of leniency to the judge having to interpret them. This also provides a lot of space for potential media manipulation.

The Netherlands and Germany have adopted comparable regulations ; the European Union is going ahead with similar legislation by 2024.

Indeed, on February 22, 2022, the European Commission adopted a resolution in the aim of compelling companies to render their global activities sustainable, by exercising a duty of vigilance respecting human rights, prohibiting child labor and worker exploitation, and environmental impact mitigation.

It is likely that the directive will be applicable as of 2024 and will concern companies with more than 500 employees and over 150 million euros in turnover. As of 2026, the directive will concern companies with more than 250 employees and over 40 million euros in turnover operating in certain sectors (textiles, footwear, agriculture, fishing, agri-food, extraction – oil-gas-coal). Companies from abroad with a turnover in the European Union exceeding these thresholds will also be required to comply.

The directive also specifies that Member States are free to be stricter than the future European law.

Sanctions against recalcitrant companies will be civil ones, with the possibility of setting the damages according to turnover.

A supervisory authority will have to be put into place by each Member State.

The Commission's press release is also considering the fact that companies should align their business strategies with the Paris Agreement, meaning limiting global warming to 1.5°C.

This can certainly generate activism, which will encourage countries to quickly adopt a binding mechanism.

These French and soon to be European regulations are strong pressure instruments that are in the hands of NGOs, rating companies, and international investment funds which examine the measures that are

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taken by companies in the fields of environment, human rights, and more generally corporate social responsibility (C.S.R.) as an elastic concept that seems to be stretched more and more.

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