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Client Alert
New French law on the corporate duty of care

The law on the corporate duty of care (*devoir de vigilance*) of parent companies and ordering companies (*sociétés donneuses d'ordres*) was adopted by the National Assembly (Assemblée nationale) on 21 February 2017, promulgated on 27 March 2017 and published in the Official Journal (*Journal officiel*) on 28 March 2017 (the "**Law**").[1]

The Law requires any corporate entity, above certain thresholds, to implement a "vigilance plan" to identify risks and prevent severe violations of "*human rights and fundamental freedoms, serious bodily injury or environmental damage or health risks resulting directly or indirectly from the operations of the company and of the companies it controls.*"

In its decision of 23 March 2017, the Constitutional Council (*Conseil constitutionnel)* censored the provisions imposing a fine for breach of the obligations imposed by the Law.

Content

1. The scope of the duty of care

1.1 Scope of the Law

The Law applies to any French company that employs at the end of two consecutive financial years:

(i) at least 5,000 employees "*within the company and its direct and indirect subsidiaries, whose head office is located on French territory*"; or

(ii) at least 10,000 employees "*within the company and in its direct or indirect subsidiaries, whose head office is located on French territory or abroad*".

Due to the wording of the text, there was uncertainty as to whether foreign companies fell within the scope of the corporate duty of care provided they met the 10,000 employees threshold.[2] However, this interpretation has not been

[1] Law n° 2017-399 of 27 March 2017 on the corporate duty of care of parent companies and ordering companies (*loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*)

[2] Indeed, during the debates in the Parliament, there have been proponents of an extraterritoriality of the proposed bill, in order to set an international example.

upheld by the *Conseil constitutionnel* which held that the Law should be read as only targeting French groups. [3]

Therefore, foreign companies with 10,000 employees worldwide and headquarters outside of France will not fall within the scope of the Law even though part of their employees are employed by French subsidiaries, provided that those French subsidiaries do not employ 5,000 employees located in France, or 10,000 globally.

According to the parliamentary debates, **the Law will affect fewer than 200 companies.**

1.2 Scope of obligations

Implementation of the vigilance plan – Companies subject to the Law must **establish and implement, "*in association with the company stakeholders involved*" and "*effectively*" a vigilance plan.** The vigilance plan must include measures to allow for risk identification and prevention of (i) severe violations of human rights and fundamental freedoms, (ii) health risks and (iii) serious environmental damages, resulting directly or indirectly from the operations of the company and of the companies it controls, as well as from the operations of the subcontractors or suppliers with whom it has an established commercial relationship, when such operations derive from this relationship.

The Law provides that the vigilance plan is to include: (i) a mapping that identifies, analyses and ranks risks; (ii) procedures to assess regularly, in accordance with the risk mapping, compliance of subsidiaries, subcontractors or suppliers with whom the company maintains an established commercial relationship; (iii) appropriate actions to mitigate risks or prevent serious violations; (iv) an alert mechanism that collects reporting of existing or actual risks; and (v) a monitoring scheme to monitor the measures implemented and assess their efficiency.

Publication of the vigilance plan and report on its effective implementation – Companies subject to the Law must publish, in their annual report of the board of directors, their vigilance plan with a report on its effective implementation.

2. Sanctions for non-compliance

The Law provides for two types of sanctions:

- **the imposition of an injunction to do, if necessary under financial compulsion,** which may be pronounced by the "*relevant jurisdiction*" or "*the president of the court, ruling in interlocutory proceedings*" at the request of any person with a legitimate interest to do so – including associations operating in the relevant fields – when a company does not meet its obligations within a three-month period after receiving formal notice to comply with its obligations; and

[3] Decision dated 23 March 2017, no. 2017-750 DC

- **in the event of a damage arising from the non-compliance with the aforementioned obligations, the company's liability and obligation to pay compensatory damages may be triggered.** The judge may order the publication, distribution or display of its decision or an extract thereof, as well as its execution under financial compulsion.

Please note that the *Conseil constitutionnel* has censored a third type of sanction: the possibility for a judge to order a fine up to EUR 10 million in the event of a company's failure to comply with its obligations under the Law.

Indeed, the *Conseil constitutionnel* determined that these provisions violated the principle of the legality of criminal offences and penalties as the legislator had not defined the obligations of the companies subject to the Law in sufficiently clear and precise terms.

3. Delayed entry into force granting some time for adaptation

The legislator has provided for a delayed entry into force as follows:

1. the obligation to have a vigilance plan will apply "*for the financial year during which the present law has been published*", i.e. as from the financial year 2017;

2. the obligation to publish the vigilance plan and the report on its effective implementation as well as the sanctions for failure to do so will apply as from the annual report of the board of directors presented during the 2019 general meeting, in relation to the financial year 2018.

Companies subject to the Law will therefore benefit from an adaptation period: during a two-year period, the implementation of their obligations will not be subject to publicity measures and the failure to comply with these obligations will not be subject to sanctions.

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