RESPONSIBILITY OF CORPORATE OFFICERS

The duty of vigilance and its impact on insurance RCMS: the end without the means

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Imposing a series of obligations without clearly defining the tools to comply with them, the duty of vigilance, enshrined in French law thanks to law no. 2017-399, has gradually become the weapon of NGOs to bring large groups to justice. It is in this context that the first decisions relating to the duty of vigilance took place on February 28, 2023 in the context of the TotalEnergies affair, which are part of a movement of accountability of companies and their managers, particularly at the European level which will almost certainly impact “corporate officer liability” or RCMS insurance policies.

Since law n°2017-399 of March 27, 2017 on the duty of vigilance codified in articles L.225-102-4 and 5 of the Commercial Code, the French legislator has decided to make French companies having activities in internationally with regard to the identification and prevention of "serious attacks on human rights, the health and safety of people as well as the environment" which could result from activities not only of the parent company but also of its subsidiaries, subcontractors and even suppliers.

The legislator has thus come to enact a duty of vigilance and require these companies to establish a vigilance plan (1) comprising five categories of measures listed in article L.225-102¬4 of the Commercial Code. Failing this, failure to comply with the obligations provided for in the above-mentioned provisions engages the liability of its author under the conditions provided for in articles 1240 and 1241 of the Civil Code and obliges him to repair the damage that the execution of these obligations would have made it possible to avoid(2).

Imposing a series of obligations without clearly defining the tools to comply with them, the duty of vigilance has gradually become the weapon of NGOs to bring to justice large groups such as: Casino, summoned in March 2021 for its alleged participation in deforestation and the violation of human rights throughout its supply chain, Yves Rocher prosecuted in March 2022 for breaches of freedom of association and fundamental rights of workers within its Turkish subsidiary, or even more recently Danone targeted by action in January 2023 for not having deployed a “deplasticization” strategy.

It is in this context that the first (long-awaited) decisions relating to the duty of vigilance arising from law no. 2017-399 took place on February 28, 2023 in the context of the TotalEnergies (I) affair, which are part of in a movement to make companies and their managers more responsible, particularly at the European level (II) which will almost certainly impact “corporate officer liability” or RCMS insurance policies in the near future (III).

I- Review of the TotalEnergies decisions of February 28, 2023 rendered on the duty of vigilance

On June 24, 2019, six associations put TotalEnergies on notice “to meet its obligations in terms of vigilance with regard to both the inadequacies of its plan and its effective implementation as well as its publication” with regard to the projects Tilenga and EACOP conducted in Uganda and Tanzania. Dissatisfied with the responses provided by TotalEnergies, the six associations summoned the company on October 29, 2019 before the president of the Nanterre judicial court ruling in summary proceedings, for the purpose of ordering it to fulfill its vigilance obligations.

It is in this context that on February 28, 2023, the magistrate of the Paris judicial court – having exclusive jurisdiction to hear actions relating to the duty of vigilance – made a first particularly reasoned jurisprudential application of the provisions of law no. 2017-399 of March 27, 2017 and declared the NGOs' requests against TotalEnergies inadmissible through two decisions(3).

1- The summary judge declares himself incompetent while pointing out the weaknesses of the law

Given the complexity of the case, the summary court appealed to a prerogative offered to the judge but rarely implemented in practice: the consultation of professors (in this case of law and economics) as amici curiae to enlighten him on the very notion of duty of vigilance. Painting an unflattering portrait of the law relating to the duty of vigilance, the court describes the notion of vigilance measures as imprecise, vague or even flexible (4) and regrets that the decree provided for by the text (5) with the aim of providing details on the content of these vigilance measures has not been published to date.

Regarding the first decisions in this area, the Paris judicial court attempts for the occasion to give a definition of corporate social responsibility which "designates a concept according to which companies integrate social, environmental and economic concerns into their activities and in their interactions with stakeholders, initially from a voluntary approach gradually supplemented by a legal and regulatory framework aimed at better governing the measures deployed and evaluating their effectiveness"(6).

Although this definition remains vague and theoretical, it has the merit of completing the work of the legislator by attempting to enlighten companies on a new form of responsibility incumbent on them. Going even further, the court emphasizes that the law establishes a general principle of duty of vigilance but does not refer to any guiding principle or pre-established international standard, and does not include a nomenclature or classification of the duties of vigilance incumbent on companies. concerned(7).

In this regard, it is indeed regrettable that guidelines have not been taken to summarize the measures to be adopted and guide companies to comply with their new obligations in terms of vigilance even though the law assigns "monumental goals protection of human rights and the environment for certain categories of business" (8). Regarding these vigilance measures, article L.225-10-4 of the Commercial Code specifies that they must be "reasonable". However, the law does not provide for any independent control body (9) competent to analyze the existence and compliance of the vigilance plan, like the French Anti-Corruption Agency (AFA) specially authorized to monitor compliance by companies. of the Sapin 2 law in matters of corruption.

Thus, control is devolved to the judge who must alone analyze "the reasonableness of the vigilance measures" (10). However, if the judge in summary proceedings is competent to order a company to establish, publish, or implement a vigilance plan, the fact remains that the latter does not have jurisdiction to rule on the "reasonable" nature or not of the measures. adopted in the vigilance plan since this assessment requires an in-depth examination of the elements of the case falling within the power of the trial judge alone (11). For this reason, the magistrate declared himself incompetent to rule in this case.

2- Reminder of the obligatory prior notice

On the modus operandi, the judge recalls that the vigilance plan is intended to be developed “in association with society's stakeholders, where appropriate within the framework of multi-party initiatives within sectors or at the territorial level. » (12), materializing through the mechanism of formal notice prior to referral to the judge and the issuance of an injunction by him (13), imposing a fortiori a dialogue between the stakeholders of the company and the the company itself (14). Failure to provide prior notice can only result in the inadmissibility of the request for an injunction filed with the judge (15).

It is in these conditions that after having noted that the formal notices sent by the six NGOs related to the vigilance plan established by TotalEnergies for the year 2018, while the latter had established other vigilance plans for years 2019, 2020 and 2021, that the summary court notes that the requests made by the associations relating to the vigilance plan for the year 2021 had not been preceded by a prior formal notice in violation of article L .225-102-4 of the Commercial Code and therefore declares the associations' requests inadmissible (16).

3- A notion with unlimited contours

In its decisions of February 28, 2023, the summary jurisdiction of the Paris judicial court attempts to tackle head-on the debate on the duty of vigilance imposed by the 2017 law without providing clear and precise answers to companies, referring this point to the trial judge whose decision will be eagerly awaited. It will therefore be up to the latter to rule on whether the grievances alleged against the company TotalEnergies are substantiated or whether the latter provides proof of compliance with its duty of vigilance with regard to the elements contained in the company's vigilance plan. TotalEnergies company for the year 2021 (17).

While waiting and in the absence of “modus operandi, master plan, monitoring indicators, measuring instruments” (18), even the most diligent companies would indeed risk facing legal proceedings (or even regulations if the regulatory authorities were seized of the question) increasingly numerous without really being able to fully understand the extent of their obligations.

II- The European desire to broaden the scope of the duty of vigilance

Where French law does not specify the risks to be identified by these vigilance measures, the proposed European Corporate Sustainability Due Diligence (CSDD) directive of February 23, 2022 imposes – on companies falling within its scope (19) – a duty of vigilance in order to identify and, where applicable, prevent, stop or mitigate negative impacts on human rights and the environment of their activities but also those of their subsidiaries or their value chains (supply , distribution, or even transport).

The proposed CSDD directive goes even further by placing an obligation on the managers of these companies to "put in place and supervise vigilance measures" (20) and more generally to take into account "the consequences of their decisions on sustainability issues, including, where relevant, human rights, climate change and the environment" (21). In the event of non-compliance, Member States will have to apply the sanctions provided for by their legislative, regulatory and administrative provisions in the event of failure to fulfill the duties of directors (22).

With regard to control, the European Commission has for its part taken care to require Member States to designate one or more authorities responsible for monitoring compliance by companies with their duty of vigilance and, for this purpose, having the power to conduct investigations, impose a sanction (23).

Despite the fact that no timetable has been set for the finalization of the directive or for its transposition by the Member States, the latter will probably (and rightly) aim to strengthen and clarify the state law in force, in particular regarding the supervisory authorities to be designated and the distribution of vigilance obligations imposed on companies and their managers.

III- The duty of vigilance and its impact on RCMS insurance policies

It should be remembered for the purposes of the exercise that RCMS policies are intended to cover defense costs and the financial consequences resulting from a claim made against a manager due to a fault incurring his liability in this quality.

In view of the above, we easily understand that the proposed European directive CSDD of February 23, 2022 expressly opens up the possibility for third parties (and especially associations) to take actions directly against managers who have not implemented implemented or supervised the vigilance measures. More subtly, French law provides that failure to comply with the obligations provided for in article L.225-102-4 of the Commercial Code engages the liability of its author under the conditions provided for in articles 1240 and 1241 of the Civil Code and obliges him to repair the damage that the execution of these obligations would have made it possible to avoid (24), which does not exclude the indictment of the managers involved in the making (or absence) of the decision. Article L.225-102-5 of the Commercial Code provides that this liability action is open to any person demonstrating an interest in taking action.

Analyzed from the angle of the responsibility of a manager, the failure to implement a vigilance plan or the adoption of an unsuitable vigilance plan could be considered as a management error committed by this manager and involving his responsibility in this capacity. In the event of a breach of the company's duty of vigilance due to a fault committed by the manager, it could thus be considered to seek the responsibility of this manager both on the basis of the violation of the statutes and the management fault, provided, however, that the third party provides proof of the existence of a causal link between the manager's breach and the alleged damage.

To date, there is no action in France directly targeting a manager for the absence or inadequacy of a vigilance plan. However, if we observe the situation across the Channel, such actions should not take long to appear before the French courts. Indeed, on February 8, 2023, an environmental defense association ClientEarth filed a complaint before the High Court in London, alleging that the eleven directors of Shell had failed in their obligation to develop a climate strategy sufficient to achieve climate objectives and prepare society for a zero-carbon transition. In this case, the directors are accused of having failed in their duty to promote the success of the company as well as their duty to act with reasonable care, skill and diligence required by British company law and more generally by the general duty of care (or "duty of care" within the meaning of the Companies Act 2006). This example could thus find an echo in France, managers having similar obligations towards society.

Regarding the sector of activity, commercial companies (and in particular those operating in the oil sector) are not the only ones to be concerned in this type of business, financial institutions are also concerned as evidenced by the first in the world and recent (February 2023) climate litigation targeting a commercial bank, in this case BNP Paribas, in that it would provide financial support to new fossil fuel development projects.

This increased interest around the duty of vigilance and the determination of associations to multiply actions to obtain binding decisions in this area will certainly lead insurers to adapt their RCMS policies to this new problem of the duty of vigilance both for commercial companies and for financial institutions. Ultimately, RCMS coverage could, for example, be expressly extended in the case of policyholders to the CSR manager, although in current policies, the latter could already benefit from coverage as holder of management and supervisory powers or if he is implicated alongside legal leaders.

Like insurance policies covering climate risks, insurers could also consider including clauses in RCMS contracts granting additional guarantee to cover defense costs incurred due to a alleged or real claim linked to a breach by the natural person director of the duty of vigilance or even for the reputational costs incurred by this director which could be colossal in view of the considerable media coverage surrounding these cases.

Also on defense costs, remember that in the event of a claim made jointly against a natural person manager and the company, the RCMS policy could also be intended to cover the latter's defense costs. , especially since the complaint is characterized within the meaning of the RCMS policies from the formal notice, the obligatory nature of which is recalled by the Paris judicial court in its decisions of February 28, 2023 (25)

In France, this duty of vigilance – coupled with group actions which are the subject of a bill of March 8, 2023 aimed at broadening their scope – therefore constitutes a dangerous base both for insured companies and managers and for insurers. who will have to carefully assess the risks linked to the duty of vigilance when subscribing (or renewing) RCMS policies, possibly based on the CSR evaluation criteria recently developed by certain brokers.

Sources of further Reading

(1) Article L.225-102-4 of the Commercial Code

(2) Article L.225-102-5 of the Commercial Code

(3) Judgments of February 28, 2023 rendered in summary proceedings by the Paris judicial court n°RG 22/53942 and n°22/53943

(4) Page 18 of the judgment, RG n°22/53942

(5) Article L.225-102-4 of the Commercial Code

(6) Page 15 of the judgment, RG n°22/53942

(7) Page 18 of the judgment, RG n°22/53942

(8) Page 18 of the judgment, RG n°22/53942

(9) Page 18 of the judgment, RG n°22/53942

(10) Page 18 of the judgment, RG n°22/53942

(11) Page 21 of the judgment, RG n°22/53942

(12) Article L.225-102-4 of the Commercial Code

(13) Page 19 of the judgment, RG n°22/53942

(14) Page 18 of the judgment, RG n°22/53942

(15) Page 19 of the judgment, RG n°22/53942

(16) Page 23 of the judgment, RG n°22/53942

(17) Page 23 of the judgment, RG n°22/53942

(18) Page 18 of the judgment, RG n°22/53942

(19) Article 2 of the proposal for EU directive n°2019/1937

(20) Article 26 of the proposal for EU directive n°2019/1937

(21) Article 25 of the proposal for EU directive n°2019/1937

(22) Article 25 of the proposal for EU directive n°2019/1937

(23) Articles 17 and 18 of the proposal for EU directive n°2019/1937

(24) Article L.225-102-5 of the Commercial Code

(25) Pages 18 and 19 of the judgment, RG n°22/53942