

Latham & Watkins [Litigation & Trial](#) and [Environmental, Social & Governance](#) Practices

18 March 2022 | Number 2941

French Parliament Publishes Evaluation Report on Corporate Duty of Vigilance Law

The report, published on 24 February 2022, assesses the implementation of the existing French corporate duty of vigilance law.

French Statute No. 2017-399 of 27 March 2017 (the 2017 Statute) created a duty of vigilance (*devoir de vigilance*) for companies crossing determined thresholds (see definitions on page 3). Such companies are required to implement a public, comprehensive plan aimed at identifying risks and preventing and mitigating serious violations of human rights, human health, and the safety of the environment. With the 2017 Statute, France bolstered what now appears to be a global movement of regulation of corporate activity through supply chain-related legislation, as it was quickly joined by the Netherlands (2019, in relation to child labour only), Germany (2021), and now possibly the EU (for more details, see this [Latham Client Alert](#)). Meanwhile, Belgium, Norway, Finland, and Luxemburg are discussing similar legislation. The UK implemented the Modern Slavery Act in 2015.

The French system instituted by the 2017 Statute is a civil liability-sanctioned duty of vigilance, under which any stakeholder (such as an NGO) may sue companies for damages in the event of non-compliance with the 2017 Statute. Non-compliance typically occurs when companies have not implemented sufficient measures aimed at guaranteeing the respect of human rights and/or the environment.

Five years after the 2017 Statute was enacted, the French Parliament mandated a commission to assess the implementation of the duty of vigilance in France and consider pathways to strengthen its efficiency. This *Client Alert* outlines the main findings and recommendations of the commission's report (the Report).¹

How Has the 2017 Statute Been Perceived in France?

The Report intends to provide an updated picture of the implementation of the 2017 Statute, as well as contribute to the debate on the introduction of corporate sustainability due diligence regulation at the EU level. Consequently, the Report synthesises a large number of interviews conducted by the commission and compiles an important number of publications reflecting a growing interest in the 2017 Statute.

According to the Report, all publications from associations, scientists, and scholars adopt one of two major conceptions about the 2017 Statute:

- The **first conception** relates to the 2017 Statute's shortcomings that were identified close to the time of its enactment. Essentially, papers highlighted the broad and undefined terms of the 2017 Statute and the lack of equal treatment between companies depending on their size, legal form, and country of incorporation. As such, most authors advocate for an extension of the duty of vigilance to a European level.
- The **second conception** focuses on the social movement generated by the 2017 Statute, which the Report notes is perceived as having inspired both European and international cooperation, worldwide research, and an extensive evaluation of controversial practices of major economic actors.

Why Is It So Difficult to Assess the Impact of the 2017 Statute?

The 2017 Statute mandates companies that meet pre-determined thresholds to set up a “vigilance plan”. The threshold is either 5,000 employees within the company and its subsidiaries in France, or 10,000 employees within the company and its subsidiaries in France and abroad. The vigilance plan is required to contain reasonable and adequate measures to identify risks and prevent serious violations of human rights and serious impacts on the environment. As such, it must include risks associated with both (i) the company's “established” business partners and (ii) the company's entire supply chain.

However, some questions remained unanswered by the 2017 Statute. For example: To what standards should companies refer to assess the respect of human rights? What are the “established business relations” triggering the obligation for a company to assess its business partners' respect for human rights? Could this notion apply to a company's supplier's supplier? What are “serious” violations of human rights, or “serious” impacts on the environment? How could the “adequateness” of a company's internal vigilance system be assessed and monitored?

Due to the 2017 Statute's silence on such matters, interested parties looked to case law to answer these questions. However, on the five proceedings initiated to date (four aiming at obtaining interim measures, one at obtaining compensation), none has yet been decided on the merits, given an ongoing debate about which courts should have jurisdiction to hear these cases (plaintiffs, mostly NGOs, argued in favour of civil courts, while defendant companies argued for commercial courts). It is only through Law No 2021-1729 of 22 December 2021 that the French legislator specified that all actions pursuant to the 2017 Statute should be brought before the Paris Civil Court (*Tribunal judiciaire de Paris*).

Following the resolution of the issue concerning the appropriate court, more details as to the effective implementation of the 2017 Statute remain to be given by case law. In any case, the Report advocates for maintaining a broad definition of the duty of vigilance in order to both (i) maintain a significant pressure on large companies and (ii) avoid the risk of falling into a purely procedural obligation, by which companies would simply check predetermined boxes to comply with the 2017 Statute without effectively considering the scope of potential environmental or human rights risks that their activities may entail.

What Are the Main Recommendations in the Report?

Towards a broadening of the 2017 Statute's reach

The Report considers that an overly limited number of French companies (or French subsidiaries of international groups) fall under the obligation to implement a duty of vigilance programme. Thus, the Report supports an extension of all the 2017 Statute's criteria of application:

- **First**, the Report recommends that the 2017 Statute apply to all corporate forms (including SARL [*société à responsabilité limitée*] and SNC [*société en nom collectif*]), particularly as some major French groups (notably in the textile and retail sectors) do not fall under the most widely used forms of SA (*société anonyme*) and SAS (*société par actions simplifiée*) captured by the 2017 Statute. These sectors are under close scrutiny as regards human rights and environmental matters.
- **Second**, with respect to the number of employees, the Report advocates for lowering the threshold for the application of the 2017 Statute.
- **Third**, in order to allow for a flexibility of the 2017 Statute's reach, the Report suggests that the company's turnover be used as an alternative criterion to the number of employees, with thresholds to be defined. The Report underlines that "large companies" are already defined under French law as entities with turnover of at least €1.5 billion or a balance sheet total of at least €2 billion.

Towards better implementation of the 2017 Statute

The Report identifies key areas for improvement in the implementation of the 2017 Statute.

- The 2017 Statute encourages companies to draft their vigilance plan with the help of "stakeholders in the duty of vigilance" (in particular, NGOs and trade unions). The Report recommends making consulting stakeholders compulsory for each company and believes this measure to be beneficial in the long run, as it will likely increase individual standards and promote a general harmonisation of vigilance plans.
- The Report examines differences between vigilance plans created by companies of similar size and economic influence and suggests endorsing "multiparty plans" on human rights and environment (already seen in the banking sector), by which similar companies may draft plans together and adopt harmonised vigilance plans.
- The Report notes that, for the sake of simplicity, companies tend to merge (i) the alert mechanism (i.e., pathways provided to employees or third parties to report human rights and environmental violations to the company) required under the 2017 Statute for vigilance purposes and (ii) the alert mechanisms under the *Sapin 2* Law (Law No. 2016-1691 of 9 December 2016, which imposes similar obligations on companies regarding corruption risks).
- While the French government is considering officially endorsing this practice, the Report warns against it. The Report recommends maintaining a strict separation between the duty of vigilance alert mechanism and the *Sapin 2* alert mechanisms and reaffirms that (i) unlike the *Sapin 2* alert mechanisms, those who have access to the pathway of duty of vigilance alert mechanism are not defined, (ii) the alert mechanism under the 2017 Statute should be established in consultation with the representative trade unions of the company, and (iii) both *Sapin 2* and the 2017 Statute are triggered by different thresholds and have different uses.

- To ensure the 2017 Statute is well implemented, the Report suggests requiring an administrative authority to monitor the application of the 2017 Statute. While the proposal would lead to important changes in the existing legislation, the Report specifies that it should not lead to certifying vigilance plans (i.e., plans approved prospectively by an authority). Certified vigilance plans may constitute an obstacle to legal action against companies, given that certification might be put forward as a defence against civil liability.
- Given the broad scope of the 2017 Statute, and in line with the decision issued on 23 March 2017 by the French Constitutional Court, the Report does not advocate for sanctions (whether criminal, administrative, or civil in nature) besides civil liability. The Report leaves to the French legislator the possibility of sanctioning determined behaviours through specific offences.

Finally, while the Report addresses certain criticisms of the 2017 Statute, it also notes that, “far from having harmed the French economy, this new obligation guarantees quality for French companies, protecting their reputation and brand image. It contributes to the attractiveness of hiring processes, as well as to better control of the production chain and to the strengthening of commercial relations with subcontractors and suppliers. It creates the conditions for ethics in globalisation, and will meet the high expectations of citizens as consumers, employees, but also as savers and investors”.²

How to Articulate Existing Rules With European-Wide Corporate Sustainability Due Diligence Obligations?

On 23 February 2022 (one day before publication of the Report), the European Commission adopted its much-anticipated proposal for a directive on corporate sustainability vigilance (the Proposed Directive).

The Report discusses many questions pertaining to the scope and enforceability of due diligence obligations. In particular, the Report:

- Recognises that some scholars criticise the far-reaching and imprecise scope of the 2017 Statute, but considers that the legislation in this area (whether in France or the EU) should remain broad enough to avoid litigation as to its scope. The Proposed Directive retains a slightly narrower scope, as it will cover actual or potential human rights and environmental adverse impacts that can be clearly defined in selected international conventions (art. 3(b) and (c)).
- Proposes that due diligence obligations should cover the whole business chain of companies as soon as there is a commercial relationship (e.g., suppliers, distributors, or commercial partners). Above a determined threshold, companies active in the EU should therefore be required to include their entire supply chain in their due diligence, as well as established business partners. The Proposed Directive is aligned with this proposition, as it aims to cover the companies’ own operations, the operations of their subsidiaries, and the value chain operations carried out by established business relationships. A business relationship is defined as a “business relationship, whether direct or indirect, which is, or which is expected to be lasting, in view of its intensity or duration and which does not represent a negligible or merely ancillary part of the value chain” (art. 3(f)).
- Notes that existing European regulations already address topics somewhat similar to the proposed due diligence obligations. This includes the 2014/95/EU directive on financial reporting and the 2020-852 European regulation on European taxonomy (defining the notion of sustainable activity). The Report recommends using the Proposed Directive to harmonise existing national and European acts and merging them into a new European corporate due diligence obligation.

- Strongly advocates for the enactment of a binding international act setting global standards on corporate due diligence.
- Strongly encourages the creation of an administrative authority to monitor the implementation of existing rules on duty of vigilance, in order to strengthen the effectiveness of the 2017 Statute. This echoes the Proposed Directive, which provides for each Member State the designation of a national supervisory authority that would (i) supervise the new rules set down in the directive and (ii) impose fines in case of non-compliance.

What's Next?

The Report is merely indicative, and does not require the French government to actually consider the recommendations. However, if the Proposed Directive is adopted, France will have two years in which to transpose it into national law, starting from the entry into force of the directive. This legislative reform would provide an opportunity to implement several recommendations of the Report, harmonise French and EU regulation, and modify the existing rules on duty of vigilance.

If you have questions about this *Client Alert*, please contact one of the authors listed below or the Latham lawyer with whom you normally consult:

Fabrice Fages

fabrice.fages@lw.com
+33.1.4062.2000
Paris

Elise Auvray

elise.auvray@lw.com
+33.1.40.62.20.48
Paris

Léo Herrenschmidt

leo.herrenschmidt@lw.com
+33.1.40.62.23.55
Paris

Inès Schapira

ines.schapira@lw.com
+33.1.40.62.23.41
Paris

You Might Also Be Interested In

[European Commission Proposes New Supply Chain Due Diligence Rules for Large Companies](#)

[The Emergence of a European Duty of Vigilance for Large Companies and Its Potential Impact at the National Level](#)

Client Alert is published by Latham & Watkins as a news reporting service to clients and other friends. The information contained in this publication should not be construed as legal advice. Should further analysis or explanation of the subject matter be required, please contact the lawyer with whom you normally consult. The invitation to contact is not a solicitation for legal work under the laws of any jurisdiction in which Latham lawyers are not authorized to practice. A complete list of Latham's *Client Alerts* can be found at www.lw.com. If you wish to update your contact details or customize the information you receive from Latham, [visit our subscriber page](#).

Endnotes

¹ https://www.assemblee-nationale.fr/dyn/15/rapports/cion_lois/l15b5124_rapport-information

² Report, page 10