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French Court Reaches Precedent Decision on the Duty of Vigilance Law

The Paris Judicial Court handed down the first ruling on the legal compliance of a vigilance plan.

On 15 January 2024, the Paris Court of Appeal announced the creation of a chamber dedicated to emerging litigation, in charge of disputes linked to Law No. 2017-399 of 27 March 2017 on the duty of vigilance (the Duty of Vigilance Law) and environmental liability cases.

This announcement follows a ruling handed down on 5 December 2023, in which the Paris Court of first instance assessed for the first time the compliance of the measures implemented by an in-scope company — namely, La Poste — as part of its vigilance plan, in particular by evaluating the effectiveness and efficiency of the measures in place.

This case marked a first acceleration in the judicial handling of duty of vigilance-related litigation. Indeed, given the timing of these disputes, it was necessary to wait until 2023 for case law to sketch out the first outlines of the regime laid down in Articles L. 225-102-4 and L. 225-102-5 of the French Commercial Code and of the judge's powers in that respect.

This Client Alert summarises the key aspects of the Duty of Vigilance Law and related considerations from the court decision.

Previous Case Decisions

Pursuant to two interim orders dated 28 February 2023,[1] the First Vice-Chairman of the Paris Court of first instance (*Tribunal judiciaire de Paris*) had the opportunity to apply this law, ruling that the claims of a number of plaintiffs were inadmissible. The Vice-Chairman reached this decision on the ground that the claims and grievances set out in the formal notice sent to the accused company in respect of its vigilance plan (Vigilance plan) were differing "substantially" from those debated before the court, in particular because the latter were the subject of a subsequent Vigilance plan.[2] In addition, it was pointed out that the requests made by the plaintiffs had to be subject to "an in-depth examination of the elements of the case exceeding the powers of the interim relief judge".

In two other rulings issued on 1 June and 6 July 2023,[3] the pre-trial judge of the Paris Court of first instance ruled in the same direction, specifying that "the demands formulated in the formal notice must be the same as those mentioned in the summons, insofar as it must be possible for each of them to be

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discussed between the parties before proceedings are instituted”. Also, the formal notice must be sufficiently precise and may not enjoin a person to adopt a certain number of measures “without prejudice to other measures which may be identified”.

However, these decisions shed only little light on the way in which judges would be called upon to assess on the merits the compliance of in-scope companies with the obligations laid down by this law.

Vigilance Plans: Structure and Content

Adopted in 2017, the Duty of Vigilance Law requires the companies[4] employing — holding company and subsidiaries altogether — at least 5,000 employees in France or at least 10,000 employees in France or abroad at the end of two consecutive fiscal years, to implement a Vigilance plan.

Endowed with a broad scope of application, the Vigilance plan must include “the reasonable vigilance measures to identify risks and prevent serious harm to:

- human rights and fundamental freedoms;
- health and personal safety; as well as
- environment”.

These measures must be determined not only with regard to the activities of the parent company and its subsidiaries, but also in consideration of the activities of subcontractors and suppliers with whom there is an established business relationship (and if these activities are connected to that relationship).

In concrete terms, Article 1 of the Duty of Vigilance Law, codified in Article L. 225-102-4 of the French Commercial Code, requires the implementation of a five-part Vigilance plan:

- A risk mapping to identify, analyse, and prioritise risks
- Procedures for regularly assessing, in accordance with the risk mapping, the situation of subsidiaries, subcontractors, and suppliers with whom the company maintains an established commercial relationship
- Appropriate actions to mitigate risks and prevent serious violations
- A whistleblowing mechanism for the collection of alerts relating to the existence or realisation of risks, established in consultation with the representatives’ trade union in said company
- A monitoring scheme to follow up on the measures implemented and to assess their efficiency

To date, and as expressly pointed out in the interim orders of February 2023, no implementing decree has been issued to supplement the content of these measures, or to specify how they are to be designed and implemented. The interim relief judge also regretted “the absence of an independent supervisory body, as well as the absence of any reference to guiding principles or pre-established international standards”, echoing the fears of a number of practitioners of the difficulties that trial judges were likely to face in assessing the implementation of a Vigilance plan.

For all these reasons, the decision handed down on 5 December 2023 by the Paris Court of first instance regarding the Vigilance plan implemented by La Poste is highly instructive.

Procedural Background

As a mandatory prerequisite to the launching of court proceedings on the ground of the Duty of Vigilance, the SUD PPT trade union first served a formal notice to La Poste to bring its Vigilance plan in line with the legal requirements, opining that the measures as set out in the appendix to the 2019 universal registration document did not meet them. The criticism originated from certain subcontractors employing undocumented workers in certain subsidiaries of the group, regarding which the company was accused of "turning a blind eye" to.[5]

Five months later, despite a few changes made by the company to its Vigilance plan, the trade union once again served a formal notice to La Poste to comply with its obligations, enjoining it both to complete its Vigilance plan and to implement adequate vigilance measures in terms of anti-harassment, fight against undeclared work, and fight against illegal subcontracting, including the implementation of a real system for monitoring these measures. As the company challenged all the grievances being raised, the SUD PPT trade union sued La Poste before the Paris Court of first instance on 22 December 2021.

Unlike previous court rulings, the debates focused directly on the merits of the case, without any procedural arguments being raised, such as:

- the requirements relating to the form and content of the formal notice;
- the identity of purposes between the formal notice and the writ of summons;
- the interest of the plaintiff in bringing the court proceedings; and
- the *locus standi* of the defendant.

The Judge's Control of the Diligence Measures

On the Risk Mapping

Risk mapping is the first stage in drawing up a Vigilance plan. Its role is of fundamental importance, since, as the Paris Court of first instance reminds from the outset, "its results determine the subsequent stages and therefore the effectiveness of the entire [Vigilance] plan".

In this case, the reading of the judgment reveals that the risk mapping designed by La Poste applied a methodology for assessing the risks associated with the Duty of Vigilance:

- La Poste identified two main types of risk, namely:
  - Risks related to the group's own activities, including its employees
  - Risks relating to its suppliers, service providers, and subcontractors, including their employees
- La Poste made a distinction between France and foreign jurisdictions
- The risk mapping covered the three main categories of duty of vigilance risks, namely those relating to (i) human rights and fundamental freedoms, (ii) health and safety in the workplace, and (iii) protection of the environment

Once the potential ("raw") risks were identified, the approach adopted by La Poste consisted of:

- identifying the risks of serious damage to be addressed as a priority;
- identifying the risk management systems in place to cover these priority risks, and analysing them to assess their effectiveness; and thus
- determining the residual risk (net risk) for each of the identified risks.

The risk situations thus assessed were then ranked according to a four-level criticality matrix (minor, moderate, major, or critical risks).

1. On the publication of the risk mapping

The SUD PPT trade union argued that the risk mapping as published was unsatisfactory since it only mentioned a methodology and not the mapping itself.

On this point, the court reiterated that, while nothing prevents the parent company and principal from confidentially holding a "detailed" risk mapping, the published version must nevertheless enable the public and the stakeholders to know the precise identification of the risks that the activity poses to human rights, health and safety, as well as to the environment.

2. On how precisely the risks should be mapped

The SUD PPT trade union also raised a number of objections regarding the content of the risk mapping, in particular the display of its results, which in its view only contained "non-exhaustive general considerations with no systematic link to any identified risk, particularly in relation to the use of illegal work in the context of subcontracting".

In the body of its decision, the Paris Court of first instance reproduced the latest version of the risk mapping examined during the proceedings, and found that "the initial risk mapping stage does not comply with the requirements of Article L.225-102-4 of the French Commercial Code".

To support their decision, the judges mainly noted that:

- the risk mapping described risks at an insufficient level of granularity;
- the risk factors likely to affect protected values were not spelled out in sufficient detail;
- the risks were analysed and prioritised at a too global level;
- the risk mapping did not sufficiently highlight priority areas for diligence; and
- prioritising risks after taking into account the prevention and mitigation measures already applied by the group had the effect of playing down the concrete implications of the company's activities on people's fundamental rights, their health and safety, or on the environment. Moreover, such an approach was inconsistent with the rest of the plan, in particular with the presentation of appropriate diligence measures designed to better prevent or mitigate these risks, since these measures appeared in reality to have already been taken into account in the assessment of "net risks".

3. On the publication of the list of suppliers and subcontractors

For the SUD PPT trade union, the risk mapping should have included a publicly available list of all the suppliers and subcontractors with whom the group had an established business relationship, so as to

enable staff representative bodies to recommend appropriate diligence measures in terms of employee health and safety, and to ensure that they were effectively implemented.

In response, La Poste argued that the Duty of Vigilance Law did not provide for any inclusion of such a list in the risk mapping, and that to impose such publication would run counter to the very principle of business confidentiality.

In rejecting the trade union's claim, the Court:

- considered that it was not essential to identify all suppliers and subcontractors, since the plan could otherwise adopt appropriate measures according to precise criteria relating to them (e.g., their sector of activity, geographical location, structure, size, or resources);
- pointed out that the trade union had itself admitted the existence of means to guarantee the effective implementation of the plan with regard to the group's regular partners, without the need to publicly disclose their identity (the trade union having agreed that "the list requested could 'a minima' be communicated to the staff representative bodies responsible for all matters relating to health and safety, insofar as the latter are bound by an obligation of confidentiality"); and
- noted the practical difficulty of drawing up such a list of partners, since it "can cover thousands of companies and fluctuate over time".

On the Existing Procedures for Assessing Subcontractors Depending on the Specific Risks Identified by Risk Mapping

As the Court pointed out, Article L.225-102-4 of the French Commercial Code requires companies to conduct a regular assessment of the situation of the subsidiaries (or controlled undertakings) and regular business partners in light of the risk mapping.

In this respect, the Paris Court of first instance noted that La Poste had listed a number of specific assessment procedures applicable to its suppliers and subcontractors.

However, since the risk mapping, which is the cornerstone of the Vigilance plan, does not specify the precise risk factors or their ranking, the Vigilance plan does not really allow measuring whether the assessment strategy defined by La Poste is really in line with the seriousness of the damage.

Under these conditions, the request to order La Poste to establish procedures for assessing subcontractors on the basis of the specific risks identified by the risk mapping has therefore been granted.

On the Whistleblowing Mechanism

Article L.225-102-4, 4° of the French Commercial Code requires that a whistleblowing mechanism be set up "in consultation with representative trade unions".

While interestingly, the Court did not appear to condemn the practice of La Poste's merging its "Sapin 2" alert system to include the alerts received in connection with the Duty of Vigilance Law, it did consider the question of whether an appropriate consultation of the representative trade unions had taken place on the specific whistleblowing system imposed by the Duty of Vigilance Law.

Defining concertation as "the will to work out measures or a decision in concert [which] cannot be limited to the simple gathering of an opinion on a system that has already been finalized", the Court focused on

analysing the evidence produced by La Poste to conclude that these documents did not prove that the trade unions had been able to express their point of view and discuss the system presented by the group's management.

On the Existence of Appropriate Risk Mitigation Measures or Serious Injury Prevention Measures

The trade union also made very specific demands of La Poste, asking the Court to enjoin the company to adopt a number of specific and concrete measures in the areas of subcontracting, psycho-social risks, and harassment.

The Court rejected these requests, holding that they went beyond the powers conferred to the judge by law, as the judge could not substitute to the company and its stakeholders in requiring them to introduce precise and detailed measures.

Thus, the judge's role is limited to monitoring the vigilance measures implemented, in line with the risk mapping.

In carrying out such a review, the Paris Court of first instance noted in the case at hand:

- that a number of measures presented in the Vigilance plan were too generic, since they could not be implemented concretely and effectively, nor followed up (e.g., "the publication of a new system for preventing and dealing with situations of harassment, including a new protocol accompanied by a guide, without the concrete actions arising from it being known"); and

- that the measures which were more specific and concrete and therefore likely to produce measurable results (e.g., "training 7,230 managers and operational staff in preventive occupational health and safety rules") appeared inappropriate, as they had not been developed in response to risks clearly identified and prioritised in the risk mapping.

These observations confirm that the key issue lies with the inadequacy of the risk mapping, from which the other measures in the diligence measures are derived.

Under these conditions, it will be up to the company, in association with its stakeholders, to "carry out an analysis of the risk factors [...] in order to reasonably develop an effective measure to avoid or limit the risk".

On the Effective Implementation of Vigilance Measures and a System for Monitoring the Vigilance Plan

The trade union also criticised the failure to implement certain vigilance measures, such as the absence of an automatic termination clause, if a service provider resorts to illegal employment. In rejecting the request to enjoin La Poste to actually implement these measures, the Court considered that this request was in fact tantamount to enjoining La Poste to complete its plan.

While a system for monitoring the effective implementation of the Vigilance plan does appear to have been drawn up, the Court notes that the report on this system published in the group's universal registration document focuses only on certain measures implemented, and is in any case succinct for a number of them. As a result, the Court concludes that it "does not enable the effectiveness of the measures taken to be usefully measured, nor does it serve as a useful assessment to guide action in terms of vigilance".

Sanctions

Sanctions for breaches of obligations under the Duty of Vigilance Law differ according to whether or not damage has occurred.

In the event of damage, failure to comply with the obligation to design and effectively implement a Vigilance plan renders the obligor liable, and obliges them to pay compensation for the damage that could have been avoided if these obligations had been fulfilled. The court may also order the publication, dissemination, or posting of its decision or an extract therefrom, or order the enforcement of its decision under financial compulsion.

In this case, as no damage was alleged, the SUD PPT trade union confined itself to requesting an injunction.

In its decision, the Court ordered La Poste to:

- complete its Vigilance plan with a risk mapping designed to identify, analyse, and prioritise risks;
- establish procedures for assessing subcontractors in relation to the specific risks identified in the mapping;
- supplement its Vigilance plan with a whistleblowing mechanism established in consultation with representative trade unions; and
- publish a real system for monitoring vigilance measures.

However, the Court did not couple the injunction with a pecuniary penalty. It considered that the usefulness of such a measure was not demonstrated in the present case, in view of the "dynamic improvement process" undertaken by La Poste to modify and enrich its diligence measures on an annual basis, as evidenced by the "significant evolution" of its Vigilance plan between 2020 and 2021.

What's Next for Companies?

At a time when the proposed directive on corporate sustainability vigilance aims to extend the scope of the duty of vigilance to a greater number of companies, including reinforced sanctions in the event of non-compliance and a dedicated supervisory authority, companies could be inclined to draw on the lessons of the 5 December 2023 ruling. While a certain amount of hindsight is still called for, given that case law in this area is still in its infancy and has not yet stabilised, companies may wish to start either (i) planning for the set-up of their future system, or (ii) carrying out an internal reassessment of their existing Vigilance plan.

By way of illustration and in the light of this decision, companies could:

- review the level of detail within their risk mapping;
- review whether the nature and seriousness of the risks, as well as the criteria used to rank them, are sufficiently substantiated;
- consider the appropriateness of prioritising risks at the level of "gross" risks, rather than "net" risks;
- ensure that the risk mapping exercise expressly identifies priority areas for diligence;

- monitor the consistency of risk mitigation measures and damage prevention actions with the priority risks identified, and ensure that these actions are actually implemented;
- reassess the level of consultation with stakeholders in the development and implementation of the Vigilance plan, ensuring that consultation is documented;
- check that the report on the implementation of the Vigilance plan, as published, presents a sufficient level of detail and exhaustively covers all the vigilance measures deployed; and
- track the improvements made to the plan following each new evaluation.

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Endnotes

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[1] Paris Court of first instance, interim order of 28 February 2023, No. 22/53942 and No. 22/53943.

[2] On the requirement that the prior formal notice should concern the same Vigilance plan as the one covered by the writ of summons, see: Paris Court of first instance, pre-trial order, 30 November 2021, No. 20/10246. See also in this case: Paris Court of Appeal, Division 5, Chamber 11, 17 March 2023, No. 22/00749.

Other court rulings on due diligence have mainly dealt with questions of jurisdiction: see in the same case, Nanterre Court of first instance, interim order, 30 January 2020, No. 19/02833; Versailles Court of Appeal, 10 December 2020, No. 20/01692 and No. 20/01693 and Court of Cassation, Commercial Chamber, 15 December 2021, No. 21.11882 and No. 21.11883. See also in another case: Nanterre Court of first instance, pre-trial order, 11 February 2021, No. 20/00915.

[3] Paris Court of first instance, pre-trial order, 1st June 2023, No. 22/07100 and Paris Court of first instance, pre-trial order, 6 July 2023, No. 22/03403.

[4] As noted in Evaluation Report No. 5124 of February 24, 2022, on the evaluation of the Duty of Vigilance Act, "the terms of Article L. 225-102-4 of the French Commercial Code stipulate that it applies to 'any company'. However, the inclusion of this article in Chapter V 'Public limited companies' of Title II of Book II of the French Commercial Code effectively restricts its application to 'Sociétés anonymes' (SA). The references made in the Commercial Code mean that the provisions applicable to SAs are also applicable to 'Sociétés européennes' (SE), 'Sociétés en commandite par action' (SCA) and, in principle, 'Sociétés par actions simplifiées' (SAS). However, during its hearing (...), the French Treasury indicated that the application of the duty of vigilance to SAS raises uncertainties".

[5] See release from trade union SUD PPT dated 15 September 2023.