

French Companies Must Show Duty of Care for Human and Environmental Rights

Article By:

Sabine Smith-Vidal

Charles Dauthier

After ***France's Constitutional Court*** rendered its decision on March 23, 2017, Law No. 2017-399 of March 27, 2017 on the “Duty of Care of Parent Companies and Ordering Companies” has finally entered into force—but is it much ado about nothing?

Following the tragic events of the Rana Plaza collapse in 2013 that resulted in the death of more than 1,000 textile workers in Bangladesh, the French government wished to set up mechanisms to prevent infringements on human and environmental rights across the whole production chain. These mechanisms concern the largest companies and their subsidiaries, either French or foreign; subcontractors; and partners. The draft bill, however, experienced a chaotic course, with strong opposition between the National Assembly and the Senate. Finally, the law on the “Duty of Care of Parent Companies and Ordering Companies” reaching voting on February 21, 2017. Members of Parliament and senators referred the law to the Constitutional Court, which rendered its decision on March 23, 2017.

According to the law, all companies headquartered in France and employing more than 5,000 employees in France, or headquartered in France or abroad and employing more than 10,000 employees worldwide, must set up vigilance plans. A vigilance plan “includes reasonable vigilance measures to identify risks and prevent serious violations of human rights and fundamental freedoms, health and safety of persons and environment resulting from the activities of the company and of the companies it controls, either directly or indirectly, as well as the activities of subcontractors or suppliers with whom an established business relationship is maintained.”

The content of the plan as defined by the law includes:

- risks mapping intended for their identification, analysis, and ranking;
- procedures for the assessment on a regular basis of the situation of subsidiaries, subcontractors, or suppliers with whom an established commercial relationship is maintained, taking into account the above risk mapping;

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- adapted actions to mitigate risks or prevent serious harm;
 - a mechanism for alerting and collecting alerts on the existence or the realization of risks, drawn up in consultation with the representative trade union organizations in the said company; and
 - a mechanism for monitoring the measures implemented and evaluating their effectiveness.

The purpose is to clearly impose a duty on major groups of companies to care for their employees and their environment, including when subcontracting pieces of work in countries that are less stringent in the protection of health, safety, human rights, or environment.

Companies meeting the criteria established by Law No. 2017-399 of March 27, 2017 must set up vigilance plans complying with the requirements established by the aforementioned law, noted above. Otherwise, if a prior formal notice remains unheeded, a judge can issue an injunction.

In the draft version of the law submitted to the Constitutional Court, to ensure the effectiveness of the duty of care, a judge could have imposed a fine up to 10 million euros if a company did not set up a vigilance plan. This fine could have been multiplied by three, or up to 30 million euros, when damage resulted from the lack of plan. However, according to the Constitutional Court, “in view of the vagueness of the language used by the legislator in defining the obligations it created, the Constitutional Court could not accept the constitutionality of the provisions imposing a fine.” Thus, after the decision of the Constitutional Court, a company cannot be fined if it does not establish a vigilance plan or does not comply with its vigilance plan. Nevertheless, the breach of the duty of care may still entail liability for the company.

Even though the law lost much of its deterrent value with the absence of fines, the duty of care is nevertheless established. The lack of coercion does not remove the issues at stake in terms of reputation. Large companies concerned with their image might improve their vigilance in ensuring their various partners comply with fundamental human and environmental rights.

In any case, under French law, an obligation of care already exists for the ordering companies, though it is limited to verifying registration of subcontractors and their compliance with various French social security obligations. Indeed, an ordering company entering into a contract with a subcontractor must carry out several verifications when the contract is for an amount of more than 5,000 euros excluding taxes. This obligation of care is set up by the French Social Security Code and French Labor Code. The ordering company must require a document certifying the subcontractor’s registration (an extract of the commercial registry or an employment repertoire card) and a certificate of vigilance issued by the Social Security authorities that mentions the number of employees and the total remuneration that the subcontractor declared at the time of its last declaration term. This document also attests to the subcontractor’s compliance with the obligations to report and pay social security contributions. The verifications resulting from the employer’s obligation of care must be renewed every six months. The ordering company must verify the validity of the certificates provided by the subcontractor. In the event of breach of its obligation of care, the ordering company may be prosecuted and jointly and severally ordered to pay taxes, social security contributions, remuneration, and other expenses of its subcontractor, and may be exposed to criminal and civil liability.

Since the provisions of Law No. 2017-399 of March 27, 2017 are of immediate application, companies meeting the criteria established by the law should begin drafting vigilance plans in order

to demonstrate the care they put into compliance with fundamental human and environmental rights. Although it may be difficult to monitor what happens in practice in a partner's premises, it is now indispensable to draft a vigilance plan.

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